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**Issue Date: 09 June 2004**

In the Matter of

DAVID L. LEWIS
Complainant

v.

ENVIRONMENTAL PROTECTION AGENCY
Respondent

Stephen M. Kohn, Esq.
Michael D. Kohn, Esq.
Washington, D.C.
For the Complainant

David P. Guerrero, Esq.
Washington, D.C.
For Respondent

Before: JEFFREY TURECK
Administrative Law Judge

Case Nos.: 2003-CAA-00005
2003-CAA-00006

## RECOMMENDED DECISION AND ORDER[1]

This case arises under the employee protection provisions of the Clean Air Act, 42 U.S.C. §7622 (2001), and five other environmental statutes.[2] Dr. David L. Lewis (hereinafter referred to

[1] Citations to the record of this proceeding are abbreviated as follows: CX – Complainant's Exhibit; RX – Respondent's Exhibit; JS – Joint Stipulation; JX- Joint Exhibit; and TR – Hearing Transcript. Due to the number of acronyms and other abbreviations used in this decision, an alphabetical list of all of these abbreviated terms has been provided at "Appendix A" to this decision.

[2] This case also arises under the Federal Water Pollution Control Act, 33 U.S.C. §1367 (2001); Safe Drinking Water Act, 42 U.S.C. §300j-9 (2001); Solid Waste Disposal Act, 42 U.S.C. §6971 (2001); Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §9610 (2001); and Toxic Substances Control Act, 15 U.S.C. §2622 (2001).The Solid Waste Disposal Act is also known as the Resource Conservation and Recovery Act.

as "Complainant") filed his first complaint with the Occupational Safety and Health Administration ("OSHA") on February 27, 1998 and settled that claim on December 15, 1998 (RX 25; TR 500). Between December 1, 1998 and December 10, 1999, Complainant filed three new complaints against EPA with OSHA and settled these complaints on January 17, 2001 (TR 261; *Lewis v. US EPA*, 1999-CAA-12, 2000-CAA-10, 11 (Jan. 17, 2001)). Then he filed another complaint with OSHA on August 13, 2001 (RX 4) but withdrew it on September 16, 2001 (RX 7). Complainant then filed the initial complaint in this case with OSHA on October 15, 2001 (CX 81; RX 8; TR 21). The Complainant filed two more complaints with OSHA, on May 7, 2002 and September 23, 2002 (CX 83; RX 9, 14). On February 2, 2003, Judge Leland dismissed Complainant's May 7, 2002 complaint without prejudice (RX 13; *see also Respondent's Pre-Hearing Statement* (Feb., 27, 2003). Of the complaints filed, two comprise the instant case, the October 15, 2001 complaint and the September 23, 2002 complaint (TR 20-21). OSHA conducted fact-finding investigations regarding these complaints and issued determinations denying both complaints (*Regional Administrator of OSHA's Letter*, October 16, 2002*;* RX 15). Complainant appealed these decisions to this Office (RX 15; *Complainant's Appeal,* October 21, 2002) and they were consolidated for hearing and decision.

A formal hearing was held in Washington, D.C. on March 4-7 and April 8-11, 2003. The record was closed at the end of the hearing except for the filing of some deposition transcripts and videotapes, which were filed in a timely manner. Complainant also provided a substitute exhibit post-hearing, *i.e*., the official transcript of the October 6, 2000 hearing of the House Science Committee ("HSC"). Post-hearing briefs were initially due 60 days after the receipt of final transcripts (TR 1328-29), but the parties were granted several extensions of this deadline due to the complexity of this case and the size of the record. Complainant and Respondent finally filed their briefs on September 11, 2003 and September 5, 2003, respectively; and filed motions to correct their post-hearing briefs on December 10, 2003 and December 2, 2003, respectively.

Complainant contends that he engaged in protected activity when employed by the Environmental Protection Agency ("Respondent" or "EPA") and that Respondent discriminated against him as a result of that protected activity. Complainant contends that he published articles, made oral presentations and contacted Congress alleging that EPA's policy on sludge was not protective of human health (*see, e.g.,* TR 118-20, 147-59, 161, 164-65, 180, 403-07, 427-28, 1103; RX 43). He further contends that in retaliation EPA required that he use unique disclaimers in his writings and speeches, collaborated against him with his adversaries, subjected him to a flawed peer review process, and disseminated papers that criticized his research and harmed his reputation (CX 96, at 3; CX 112, at 2-3; RX 71, 78, 93; TR 185-89, 221-22, 229, 234, 239-40, 339, 404-05, 461-62, 470-71, 633-36, 875-76, 882-84, 898-99, 969-70, 975, 1016, 1018, 1184, 1194-97). Respondent denies it took any adverse personnel action against Complainant (TR 28; CX 14). Based on the evidence contained in the record of this proceeding, it is recommended that this case be dismissed.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Background

Complainant has worked as a scientist for EPA, in its Athens, Georgia, laboratory from 1971-75 and then since 1977 (CX 61, at 1-4). Complainant received his Bachelor of Science degree in Microbiology and his doctorate in Microbial Ecology from the University of Georgia ("UGA") (CX 61, at 1). At the time of the hearing, Complainant was a GS-15[3] research microbiologist at EPA (TR 40-41). Simultaneous with his tenure at EPA, Complainant also was an adjunct professor at UGA for a number of years beginning in 1989 (TR 44-45; CX 61, at 4). Complainant testified that, in the mid to late 1980's, he was responsible for discovering that nitrogen and phosphorus are crucial nutrients in speeding up the breakdown of pollutants in soil and water (CX 61, at 2l; TR 42-43). More recently, Complainant testified that he was responsible for discovering that certain viruses in dental equipment escaped the usual disinfection process and infected dental patients with various diseases, including the AIDS virus (TR 63-67). As a result of the latter discovery, the American Dental Association ("ADA") and the Center for Disease Control ("CDC") changed their guidelines (TR 67), the issue was given a vast amount of media exposure and Complainant's research was published in a prestigious medical journal (CX 75, 77, 78, 136, 138; TR 69-70, 125-26). Despite initial opposition from the ADA, the California Dental Association, and dentists nationwide, EPA publicly supported Complainant's research and responded to inquiries about it, making it clear that while Complainant's research was an outside activity, and not done in his official capacity at EPA, he had the right to do such research (TR 73; *see* CX 1, at 13-14, 17-19). It was typical for EPA to respond to such inquiries (CX 1, at 19-22). As a result of this dental research, EPA nominated Claimant for the 1997 Maxwell Finland Award, a national award (CX 128; TR 75-76; *see* CX 1, at 22-23).

On December 1, 1998, EPA assigned Complainant to the Department of Marine Sciences at UGA under an Intergovernmental Personnel Act assignment ("IPA") (CX 61; TR 121). This IPA assignment resulted from a settlement of one of the whistleblower claims that Claimant had previously filed against EPA (*see* RX 25, at 1-2; TR 565). Pursuant to this IPA, Complainant was required to "[d]evelop research approaches and carry out scientific experiments on dental device contaminants that pose a risk of infection from human pathogens, and the relationship of this work to environmental issues of concern to the EPA" (CX 8, at 6; RX 28, 35, 37, 39, 42; *see* JX 1, at 127; RX 25, at 2). Complainant testified that he was sent to UGA to work primarily on biosolids research (TR 446-47, 458). While on his IPA, Complainant was not subject to "much direct supervision" (JX 1, at 6; *see* CX 24, at 18). During this IPA, Complainant continued the dental research he began prior to his IPA (TR 125). Complainant was also involved in an innovative research project in Egypt, studying cross infection of Hepatitis C and other pathogens in medical devices and was engaged in research regarding human exposure to pathogens from

[3]At all times relevant to this case, Complainant was a GS 15 scientist (*see* RX 29). It appears that Complainant was promoted to this position following a whistleblower action in which he alleged he was not promoted for discriminatory reasons (*see* RX 29; *Lewis v. USEPA*, 2000-CAA-10, 11 (ALJ, Jan. 17, 2001).

dust or water due to the spread of Class B sewage sludge on land (CX 61, at 1; TR 41, 122-23). All of these research projects were within the scope of Complainant's IPA assignment (*see* JS 28; CX 9). Complainant stated that he believed that if he worked outside the scope of his IPA and "EPA's mission" he could face criminal prosecution (*see* TR 124-25, 557).

**B. Structure of EPA[4]**

EPA is divided into twelve program offices and ten regional offices (*see* RX 1). Each of the program offices is headed by an Assistant Administrator ("AA"). Complainant's tenure at EPA has been within the Office of Research and Development ("ORD"), one of EPA's twelve program offices (TR 60; RX 1). ORD is comprised of five divisions (RX 2). Complainant's work at EPA has been within the National Exposure Research Laboratory Division ("NERL") of ORD (TR 60, 866). NERL is headquartered in Research Triangle Park ("RTP"), North Carolina (TR 867). NERL, in turn, is broken into six divisions, and Complainant's tenure at EPA has been within the Ecosystems Research Division ("ERD") of NERL (RX 2; TR 60). ERD is located in Athens, Georgia (TR 867). ERD is separated into branches and, at all times relevant to the instant case, Complainant worked within the Ecosystems Assessment Branch ("EAB") of the ERD (TR 60, 869).

At all times relevant to this case, either Dr. Paul Gilman or Dr. Norine Noonan[5] was the AA for ORD; Dr. Gary Foley was Director of NERL; Jewel Morris was the acting Deputy Director of NERL; [6] Dr. Rosemarie Russo[7] was Director of ERD; Dr. Harvey Holm or Dr. Robert Swank[8] was Research Director of ERD and Frank Stancil was Branch Chief of EAB[9] (JX 1, at 4, 7; CX 1, at 4-7; CX 22, at 2; CX 43, at 2; CX 45, at 5; TR 60, 618). Complainant's first line supervisor was Stancil, second line supervisor was Russo, and third line supervisor was Foley (TR 60; JX 1, at 5-6; CX 1, at 9-10). Foley is Morris's supervisor (TR 865). Complainant did not directly report to the AA or the Administrator of EPA (TR 60).

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[4] Because of the complexity of EPA's structure, a flow chart of the offices and personnel pertinent to this case has been provided at "Appendix B" to this decision.

[5] Noonan was appointed AA for ORD in 1998 and was slated to end her tenure in this position in 2001 (CX 43, at 2). Gilman was her predecessor (*see* TR 60).

[6] Morris is in charge of implementing NERL policy (found at RX 132), not ERD policy (TR 633).

[7] Complainant's counsel also represents Russo in a separate whistleblower action against EPA (CX 1, at 138).

[8] Holm became Research Director in 1999 (TR 618). Prior to Holm's tenure as Research Director, Swank held the position (CX 39, at 8; TR 97).

[9] Harvey Holm and Rochelle Arujo were Branch Chiefs prior to Stancil and also supervised Complainant during his IPA (JX 1, at 6-7). Holm supervised Complainant from 1995-99 and previously in the mid-1980s (TR 618, 645).

The Office of Water ("OW") is another program office within EPA and is separate from ORD (TR 927). The Health and Ecological Criteria Division ("HECD") is located within the Office of Science and Technology ("OST"), an office within OW (*see* CX 46, at 2). At all times relevant to this case Jeanette Wiltse was the Director of HECD, Alan Hais was the Associate Director of HECD, Tudor Davies or Geoff Robbs was the Director of OST and Charles Fox was the AA of OW (CX 46, at 2; CX 49, at 8). Alan Rubin is a senior scientist in HECD (CX 46, at 2; CX 49, at 8). Rubin's first line supervisor is Hais, second line supervisor is Wiltse and third line supervisor is Davies or Robbs (*see* CX 46, at 2; CX 49, at 8).

The Office of Waste Water Management ("OWWM") is also located within OW (TR 755, 758). The Municipal Support Division ("MSD") is found within OWWM and the Municipal Technology Branch ("MTB") is within the MSD (TR 755-56). Charles Gross is the Branch Chief of MTB and Michael Cook was the Director of OWWM (TR 755-56; 784, 1086). Dr. John Walker is a GS 14 physical scientist in OWWM and has no supervisory or managerial duties (TR 754-56, 758). Walker is also the quality assurance and quality control manager for OWWM (TR 802; CX 151). In this role, Walker evaluates EPA documents for suitability prior to public dissemination (TR 802-03). Both Gross and Cook supervise Walker (TR 571, 755-56; 1086).

All of EPA's program offices report to the Administrator of EPA (*see* TR 927; CX 49, at 7-8). There is an expectation at EPA that all of the program offices will coordinate with one another if one office is working on science that affects another office (*see* TR 928, 992, 994-95).

### C. EPA's Scientific Publication Procedures

If a scientist working in ERD generates a technical or scientific paper, it is reviewed first by the Branch Chief, then the Research Director of ERD and then the Director of ERD (TR 619; *see* JX 1, at 7). If Russo was unavailable to review the technical or scientific paper, either Holm or Swank, the Research Director at that time, would act on her behalf (TR 619-20; *see* CX 39, at 10-11, 17-19, 68, 74-76, 79; JX 1, at 8). The Division Director, or a representative, completes, and submits to NERL, an NERL/ORD clearance form, indicating the type of review the paper underwent (dependent upon what the paper is) and whether NERL should be alerted to the paper (TR 635, 870; RX 132, at 18, 27). The Division Director should alert NERL about a paper if the paper has policy implications (TR 870-71).

If an EPA scientist prepares a technical or scientific paper that has policy implications, ORD/NERL policy requires that the Division send a copy of the paper along with a transmittal memorandum and fact sheet to Henry Longest, the Deputy AA for Management in ORD (TR 334-35, 627, 711; *see* JX 1, at 20-21; CX 1, at 141; CX 45, at 56-58).[10] The Division drafts the fact sheet, which should include "[b]ackground information that would alert senior managers of factors that might create questions . . ." (TR 627, 879, 881). The fact sheets are transmitted to several layers of managers prior to reaching Longest (TR 627-28, 879). This policy was

[10] An author may bypass this procedure where a paper does not have policy implications (CX 45, at 58-59).

implemented to keep Longest abreast of the content of papers that may attract media or Congressional attention (TR 335, 381-85).

If a scientist in NERL prepares a technical or scientific paper for a journal that provides a peer review, it is NERL policy to have the scientists submit the paper to that journal for peer review and incorporate the journal's suggested changes into the paper (TR 624). Following the journal's peer review, NERL would perform the above-referenced internal clearance process review (*see* TR 624). However, if that scientist is in ERD then the paper must undergo the above-mentioned internal clearance process prior to submission for the journal peer review (TR 624). After this clearance, the paper is submitted to the journal for peer review and ERD performs no other clearance procedures on the scientist's paper (TR 625; *see* JX 1, at 40-41). Only ERD's Director, Research Director or Branch Chief have the ability to stop a paper by an ERD scientist from being published (JX 1, at 42, 44). Once these supervisors approve publication, their supervisors only have the authority to alter disclaimers (JX 1, at 47).

Sometimes, technical or scientific papers are subject to an "internal" EPA peer review, rather than, or in addition to, a journal peer review. EPA has specific policies to follow when conducting "internal" peer reviews. Upon reviewing a scientist's paper, the Branch Chief and the scientist determine the classification of the paper and whether it should undergo "internal" peer review (TR 648). If a paper is subject to an "internal" peer review, the selection of the appropriate reviewers is critical (TR 1281). The coordinator of the peer review has the responsibility to assure that appropriate peer reviewers are selected (TR 650-51). A peer reviewer should not have a vested financial interest in the article under review, should not be an aggressive critic of the author and should not have any other conflicts of interest (CX 145, at 67; TR 325, 528-29, 649-51, 1006-08). The peer reviewers also should possess a technical competence in at least one of the subject matters of the paper under review (CX 145, at 68; TR 651, 1007, 1126-28, 1282). The peer reviewers should maintain a formal record consisting of "all materials considered by the individual peer reviewers of the peer review panel as well as their comments and other input" (CX 145, at 57; TR 361, 1128-29). It is inappropriate for a peer reviewer to give an article to an outside source to review or to pass an outside source's review off as one's own (*see* TR 1275-76, 1291). A peer reviewer should not seek help with a peer review from a third party without first consulting the author of the paper, if seeking help entails revealing the paper's substance or authorship to the outside source (TR 1241-42). It is EPA policy to seek an "external" peer review if the subject matter of the written paper is controversial within EPA (TR 652-53, 1287). In the scientific community a lack of quality of research is reflected if a paper fails to pass an EPA "internal" peer review process (TR 530). Once a peer review is complete, it is inappropriate for anyone other than the author of the paper to release critical peer review comments to a third party (TR 1277). While internal peer reviewers do not ultimately determine if a paper is publishable, their comments are "taken seriously" (JX 1, at 47-48, 49); the author of the peer reviewed paper must either conform the paper to these comments or rebut these comments (CX 1, at 72-73).

Sometimes, scientific or technical papers are only subject to an "informal" review, rather than, or in addition to, a peer review. An informal review is different than a peer review. Informal reviewers can have a conflict of interest (*see* TR 525-26). Complainant's practice is to obtain informal reviews from persons with conflicts of interest because it builds his credibility

and they usually pose valid objections (TR 528). Greater weight is placed upon a negative "internal" peer review than on a negative informal review (TR 530).

**D. EPA Procedures for "Outside Activities"**

Russo is the Deputy Ethics Official at ERD (JX 1, at 60). In this role, she makes "sure that everyone [at ERD] is satisfactorily and successfully trained in the ethics regulations" (JX 1, at 60). Employees who would like to engage in "outside activities" need to consult with Russo prior to engaging in these activities (JX 1, at 60-63). "Outside Activities" are activities that are not carried out during an EPA scientist's official duties but are "along the lines of [the scientist's] EPA work" (JX 1, at 61-63). These types of activities include outside speaking, writing or teaching activities (JX 1, at 61). Employees may refer to their EPA employment when engaged in "outside activities" as long as they also provide their other biographical details (JX 1, at 63-64). Further, when engaged in "outside activities," employees are required to state that they are "speaking as a private citizen" and not for EPA (JX 1, at 64). Foley and Morris never instructed Russo to look into Complainant's "outside activities," but Russo recalls them reminding her to make sure Complainant is issuing disclaimers during his "outside activities" (JX 1, at 129).

**E. 40 C.F.R. 503**

In 1984, EPA first began drafting 40 C.F.R. 503 ("Rule 503" or "Sludge Rule") (CX 49, at 8-9). Rule 503 is a Federal Regulation providing guidance to states and industry on how to disinfect sludge and safely apply it to land (TR 79). Water treatment plants produce sludge, otherwise known as biosolids when they gather, combine and treat domestic, medical and industrial solid waste (TR 80-82). Water treatment plants can process both Class A and Class B sludge (TR 82). Class A sludge contains lower pathogen levels and has undetectable levels of disease-causing microorganisms, while Class B sludge contains higher levels of disease causing microorganisms (TR 82-84; CX 49, at 85-88). Pursuant to the Resource Conservation and Recovery Act, biosolids are not a hazardous material or toxic (CX 49, at 44-46, 49). Prior to Rule 503, ocean dumping was the method used for recycling biosolids (CX 49, at 42-44). In formulating Rule 503, EPA relied on studies on the hazards of solid waste previously conducted, rather than conducting new studies (CX 49, at 93-95, 127).

Rule 503 was initiated when a group of EPA's OW scientists, led by Rubin, undertook the task of "identify[ing] pollutants that [they] would eventually consider for regulation" (CX 49, at 7, 9-10). Scientists from ORD, OW, Solid Waste Office, Office of Air, and the Office of Policy Planning and Evaluation all participated in developing Rule 503 (CX 49, at 15-16). In 1986 an "embryonic risk assessment" of Rule 503 was submitted to EPA's Science Advisory Board for peer review (CX 49, at 10). A second review of Rule 503 was submitted to EPA's Science Advisory Board in approximately 1989 or 1990, specifically addressing the issue of incineration (CX 49, at 11). Rule 503 was published for public comment in 1989 and shortly thereafter was reviewed by a group of approximately "15 world renowned scientists who were involved in agronomy research [and] soil contamination" and who were proficient in the use of biosolids, fertilizers and manures (CX 49, at 12). This group, known as W-170 and chartered by the United States Department of Agriculture ("USDA"), conducted a peer review of Rule 503 and provided EPA scientists working on Rule 503 with comments that affected the final draft of

the rule (CX 49, at 12-13, 17). Concurrently, the scientists working on Rule 503 issued an interim Rule 503 notice for public comment and conducted a "national . . . survey to determine the levels of pollutants in biosolids" (CX 49, at 13-14). Upon reviewing Rule 503, scientists at ORD had concerns (JX 1, at 91-92; CX 1, at 24-25, 29-35; CX 116; TR 98-100; *see* CX 22, at 4-5; CX 52, at 212-13). Between 1989 and 1993 the OW scientists incorporated the public comments into the final version of Rule 503 (CX 49, at 14, 17). On February 19, 1993, Rule 503 was published (CX 49, at 13-14, 17). Rule 503 has a preamble listing ORD's concerns and noting that these concerns would be researched (JX 1, at 92).[11] Thereafter, Rule 503 underwent a "final review process called the red border" (CX 49, at 17). The group that conducted this review had members from ORD, Office of Air, Office of Policy Planning and Evaluation, Regional Offices, and Office of General Counsel ("OGC") (CX 49, at 18). OW continually provides regulation maintenance to Rule 503 and in 1999 had three actions in place to update Rule 503 (CX 49, at 24). Rubin chairs the work group responsible for these amendments to Rule 503 (CX 52, at 32). During the implementation process, EPA did not perform a risk assessment on pathogens in biosolids (CX 46, at 14). Since its implementation, various industries and government entities have brought lawsuits to challenge Rule 503 (CX 49, at 18-23).

Since its inception, Rubin has had responsibility over Rule 503 and "considered it to be [his] major professional achievement" (CX 49, at 8-9, 148). He is a "principal in the development and maintenance of the regulations for the use and disposal of biosolids" (CX 49, at 7). Part of Rubin's job entailed addressing the concerns of the Rule 503 opponents and proponents (CX 46, at 6). Rubin acknowledges that he can get too passionate in views on biosolids (CX 52, at 104-06). Hais characterizes Rubin as an EPA "spokesperson" for Rule 503 (CX 46, at 2). Rubin testified that he "feel[s] [his] reputation would be somewhat disparaged if the basis of the rule, and the scientific findings were shown to be in error" (CX 49, at 149).

Walker also has a significant role in maintaining and implementing Rule 503. Walker's main responsibility in OWWM is the implementation of EPA's biosolids program and coordinating with individuals outside of EPA who have questions or concerns about the biosolids program (TR 756-57). He is also the head of the Biosolids Program Implementation Team ("BPIT") (TR 799-800). BPIT's vision is an "effective national biosolids program" and its mission was "to encourage recycling and increase public acceptance" of biosolids (TR 800-01; CX 94, at 4). He was also in charge of running a program for encouraging the beneficial use of biosolids and the of biosolids awards program (TR 808, 819; CX 151; *see* TR 815). Part of his job in this role is to "prevent the loss of public confidence in the biosolids program" (TR 816, 818). He has had the authority to speak about biosolids on behalf of EPA for many years, although he does not speak on new policy (TR 816, 818). He is one of the "foremost authorities" on biosolids in EPA, and the biosolids community regards Walker, along with Bob Bastain, Rubin, Hais and Gross, as national biosolids spokesmen in EPA (TR 797, 817; CX 150, at 4; CX 151; *see* CX 52, at 103).

EPA's policy regarding biosolids "was to encourage the beneficial use of biosolids" and "to prevent restrictive local ordinances and bans on land application" (TR 818, 1212; CX 52, at 120-

[11] Originally, ten million dollars was allocated to ORD to research these concerns; however, over time that funding was cut to only one million dollars (CX 22, at 4-5; *see* CX 1, at 27, 35).

21, 124,147). Following the implementation of Rule 503, OW was concerned about states over-regulating land application of biosolids (CX 46, at 5, 223, 225). In response to this concern, the AA of OW issued a memorandum stating "that any regulation of sewage sludge by states which depart[s] or is more stringent than 503 should be based on good science" (CX 46, at 5; *see also* CX 49, at 107-08, 110).

**F. Timeline of Events**

The work-related problems that initially gave rise to this complaint stemmed from Complainant's work involving Rule 503 and biosolids. On June 7, 1996, the journal *Nature* published Complainant's commentary discussing, among other things, Rule 503 and "the importance of science behind environmental policies, rules and regulations" (CX 67; TR 94; CX 22, at 3). In response to this commentary, *The Atlanta Journal-Constitution* contacted Complainant and asked for his best example of "bad science behind an EPA regulation" (TR 94). Complainant posed this question to his EPA colleagues at ERD, and other EPA laboratories, and found Rule 503 was the consistent answer he received (TR 94-95). Upon reviewing the peer reviews of Rule 503, Complainant found concerns regarding whether the heavy metals in sludge are adverse to the public health, and that pathogens in the sludge were not looked into (TR 95-97). He attributed his latter concern to the lack of microbiologists on the peer review (TR 95-97). Complainant also encountered a memorandum written by Swank to Rubin discussing some of ORD's concerns with Rule 503 (TR 97-100 (citing CX 116)). On July 27, 1996, *The Atlanta Journal-Constitution* reported that "the sludge rules [are] a prefect example of how science at EPA is in a 'state of crisis,' defeated in a struggle with politics and bureaucracy," noting the Complainant as the source of this contention (CX 68). At or around this timeframe, Russo testified that she forwarded Complainant's *Nature* commentary to Foley and Foley responded, asking if Complainant had a "death wish" (CX 22, at 3; *see* CX 1, at 92; TR 112). Foley denies ever making this statement (CX 45, at 136-37).

On October 11, 1996, Russo received an email from Thomasa Clark, EPA's Acting Deputy Administrator for Management (CX 72), asking her to counsel Complainant because a recent article he wrote, published in *The Athens Banner Herald* (*see* CX 72), identified Complainant as an EPA employee but did not contain an appropriate disclaimer, alleging a possible violation of the Hatch Act (a criminal violation) (CX 71; TR 112-15). Clark alleged that this was a violation because Complainant "identified himself as a[n] EPA employee in the prologue of the article" and "5 C.F.R. Part 2635, Subpart H, 'Outside Activities,' established restrictions on employees' use of their official title or positions in outside writing activities" (CX 71). However, on April 3, 1998, Clark retracted this accusation of a violation of the Hatch Act and reassured Complainant that his *Nature* commentary and article in *The Athens Banner Herald* did not violate the Hatch Act (CX 72).

In 1997, the American Academy for the Advancement of Science ("AAAS") asked Complainant "to be a panel member making a presentation on [his] research at EPA" at its 1998 Annual Meeting and Science Innovation Exposition ("Exposition") (TR 118; *see* CX 121). Complainant presented his research during the Exposition in February, 1998, discussing his theory that pathogens survive longer in the oils and greases of biosolids and pose a risk to human health (TR 119-20; *see* CX 121). Complainant made this presentation in his official capacity as an EPA scientist (TR 119). Prior to this presentation, Complainant drafted an abstract of his

presentation, which ORD had previously cleared[12] (CX 122; TR 118-19). Complainant's presentation at the Exposition was the first public allegation of this alleged pathogen problem with Rule 503 (TR 119-20; CX 140, at 20-23). On February 28, 1998, as a result of this presentation, *Science News* published an article discussing Complainant's criticism of Rule 503 entitled "*Bacteria May Hide in Hunks of Gunk*" (CX 120; TR 120). Upon reading this article, Rubin was concerned that the public may perceive Complainant's opinions as EPA's policy, which it was not (CX 49, at 78).

On July 8, 1998, Finnis Williams, attorney for the Sierra Club, asked Complainant to be an expert witness in an upcoming case involving sludge (RX 142). On July 10, 1998, Complainant sought permission from Foley and Russo to engage in this expert witness activity (RX 143, at 2). Foley granted Complainant approval on July 24, 1998, "as long as [Complainant] ma[d]e it clear during [his] testimony that [he is] not representing the Environmental Protection Agency and that views expressed are [his] personal ones" (RX 144).

Later that year, Finnis Williams asked Complainant to be an expert witness in the *Marshall v. Synagro* case (a.k.a. *Marshall v. Wheelabrator*) (TR 132; *see* RX 145; CX 82, at 44). The *Marshall* case was a wrongful death toxic tort case (TR 132-33). The claimant in the *Marshall* case alleged that a young man's death, due to difficulty breathing, was caused by the land application of sludge on property located 100 meters from his home (TR 132-33). The defendant in the *Marshall* case was Synagro Technologies, Inc. ("Synagro"), a company that applies sludge to land and is an advocate of the land application of biosolids (CX 140, at 55-56). Complainant sought permission to serve as an expert witness in this case on December 16, 1998 (RX 145; TR 309-10). EPA gave Complainant permission to undertake this role as expert witness; however, Complainant was to consider this role an outside activity (TR 133-34, 309). In his first expert opinion report, Complainant concluded "that more likely than not exposure to the dust coming from the field and the gaseous emissions contributed significantly to the death of this young man" (TR 134). He also criticized Rule 503, noting that in drafting it EPA "did not consider the effects of the combination of the chemicals and microorganisms and some of the breakdown products of the microorganisms" (TR 134). In his second expert report, dated January 23, 2001, Complainant noted that it did not necessarily follow from the implementation of Rule 503 that biosolids are not harmful to the public health, pointing out reasons that Rule 503's implementation was flawed and land application of biosolids may result in harm to the public health (CX 82, at 44, 57-59; TR 135). These statements were inconsistent with EPA's policy regarding land application of biosolids (TR 137-42; *see* CX 123, 127). Complainant's expert reports also contained reference to his IPA research conducted at UGA (TR 310). Complainant provided a copy of his expert reports to EPA's Office of Inspector General ("OIG") because he believed that OIG should investigate EPA's handling of Rule 503 and opposition to Rule 503 (TR 136-37).

Synagro also sought an expert witness from EPA for the *Marshall* case, but EPA declined to allow an EPA employee to participate as an expert witness for Synagro (RX 150).

On October 28, 1998, AA Fox responded to a Pennsylvania resident's concern over the land application of biosolids (CX 127). In this letter, Fox specifically addresses this person's

[12] Swank and Holm cleared this abstract for distribution (CX 121, at 2).

concern over Complainant's "claims about pathogens in biosolids and his conclusion that pathogens cannot be adequately monitored in biosolids" (CX 127, at 2). Fox stated that

> scientists in EPA's Office of Research and Development's laboratory in Cincinnati, Ohio investigated Dr. Lewis' claims. Results of their studies support the conclusion that the minor amount of lipid material in biosolids does not interfere with an accurate quantitative determination of pathogens in biosolids and that the Part 503 Rule is adequately protective of public health from pathogens in biosolids.

(CX 127, at 2). Complainant did not think that this representation was accurate because "[t]he studies conducted [in Cincinnati] did not specifically and appropriately address the issues that [Complainant] has raised and the report that was released was not something that had been peer reviewed. It was . . . [Complainant's] understanding [that] it was just a preliminary assessment that was not complete" (TR 142). Complainant was not contacted regarding the drafting of this letter; however, he does not indicate why he should have been contacted (TR 143). Complainant is unsure whether he was in the midst of a whistleblower lawsuit with EPA at the time that this letter was drafted (TR 143).

In November, 1998, Rubin testified before a committee of the New Hampshire legislature (CX 49, at 139-40, 144). During this testimony Rubin gave EPA's view of Rule 503 and the land application of biosolids (CX 49, at 140). He does not recall Complainant's name coming up during this testimony or, if it did, what he said about Complainant (CX 49, at 140-41, 152). However, the transcript of Rubin's testimony indicates that Rubin said, "Dr. Lewis represents himself as an employee of EPA. He says we don't know how to manage pathogens because of the coating around the pathogens. . . . Pay no attention to the man behind the curtain"(CX 49, at 145-46). He also suggested that if Complainant were speaking about Rule 503 to ask Complainant for travel papers to verify whether or not he was speaking on behalf of EPA (CX 49, at 151-52).

That same year, Complainant began his IPA at UGA (TR 121). When Complainant began his IPA with UGA he had a strong reputation and there were discussions regarding a possible faculty position following his retirement from EPA (TR 280-81; CX 24, at 21-22).

On December 15, 1998, Complainant voluntarily entered into a settlement agreement with EPA regarding the whistleblower complaint he filed on February 27, 1998 (RX 25; TR 500). Pursuant to this settlement agreement, EPA agreed to place Complainant on an IPA at UGA for a two year period (RX 25, at 1-2; TR 565). Complainant testified that his attorney did not favor him entering into this settlement agreement and that after he entered into it he sought help from many people[13] to undo the settlement agreement (TR 498; *see also* RX 34, 164). In 2001, Complainant questioned the legality of the settlement agreement and stated that "[s]ince [he] no longer plan[ned] to pursue employment at the University of Georgia, as I started out in

[13] In February, 2001, Complainant attempted to have Senator Thompson write President Bush requesting that Complainant's "forced" retirement be reversed (RX 40). However, this issue was not pursued further (TR 501). Several members of Congress wrote letters to EPA and these letters may have referenced reversing Complainant's "required" retirement (TR 502).

1998, [his] alternative is to try to go back to the EPA and undo the settlement agreement" (RX 41, at 20).

Also in December, 1998, J. Lloyd Breedlove, President of the Customer Support Group of Steris Corporation ("Steris"), contacted Complainant to inform him that the company would compensate him for his services while he is on his IPA assignment at UGA (RX 32; TR 495). While working for Steris, Complainant earned $78,150 per year to speak at conferences on germ sterilization issues (TR 496-97). This employment was in addition to his IPA employment, and Complainant testified that the ability to engage in the Steris employment was a motivating factor for him to engage in the IPA (TR 495-97; RX 33, at 3). Complainant worked for Steris until December, 2000 (TR 497).

Sometime between 1998 and1999, Complainant met with staff members in the United States House of Representatives and with members of the HSC regarding his Rule 503 concerns and a whistleblower complaint (TR 147-48; *see* CX 43, at 4). Congressman Charlie Norwood suggested that Complainant come to the House and discuss this matter (TR 148). Through this process Complainant spoke with the Chairman of the House's Natural Resources Committee and other leading representatives in the House and presented a draft letter to EPA Administrator Carol Browner for them to sign (TR 148-49). Some members of Congress signed this letter and sent it to Browner (TR 149). The HSC planned to have a hearing on the issues that Complainant presented (*see* CX 43, at 4). On September 27, 1999, *Time* magazine wrote an article, entitled "*Fight Over Sludge Starts to Get Dirty*," chronicling these events and referencing the Complainant (CX 139; TR 149-50).

Dr. Norine Noonan, AA for ORD at this time, first learned about Complainant in connection with this planned Congressional hearing (CX 43, at 2, 4). Noonan studied the GAO report issued in connection with this planned hearing in preparation for testifying, but the hearing did not occur at that time (CX 43, at 4, 5). Noonan felt that the GAO report "lack[ed] substance" (CX 43, at 4). At this time, Noonan did not make any inquiries at ORD regarding potential whistleblower problems because the complaint "happened before [her] tenure, and [she] [did not] see any reason to go back and look that ground over again" (CX 43, at 4). Noonan was unaware of ongoing whistleblower issues and was unable to enunciate what activities were covered under whistleblower statutes (CX 43, at 4-5). Noonan received no training about whistleblowing activities during her tenure at EPA but does recall receiving a mass mailer electronically that reviewed whistleblower's rights (CX 43, at 5, 16).[14]

In October,1999, Complainant co-authored another article for *Nature* and Russo failed, after approving it for publication, to send it to NERL for review during the review process (TR 933; *see* CX 1, at 87-88; CX 15). There was no disclaimer in this article (CX 15; CX 1, at 139-40). Just prior to *Nature's* publication of Complainant's article, Noonan visited ERD and met with Russo, among others (CX 43, at 5). During Noonan's visit, Wayne Garrison, a co-author of the *Nature* article, told Noonan about the upcoming publication (CX 43, at 5); however, Russo made no mention to Noonan of the *Nature* article (CX 43, at 5). Noonan was concerned upon

[14] Morris and Walker testified that they have never had training about whistleblower's rights either (TR 935-36, 1112).

learning of the upcoming publication because *Nature* was a prestigious publication and she had not yet heard about the article (CX 43, at 5, 18). Noonan obtained a copy of the article when she arrived back at her office in Washington, D.C. (CX 43, at 6). Upon reading the article, Noonan became concerned because it contained policy implications and the article was never forwarded to NERL's attention (CX 43, at 6-7). Noonan felt that Russo was at fault for not forwarding the article, especially in light of Noonan's recent visit (CX 43, at 7, 9, 17-18, 21; *see* CX 44, at 13).

Upon publication, Foley determined that Russo should have sent the *Nature* article to NERL for review because it had policy implications (TR 933). It was ERD policy to clear articles prior to journal peer reviews (TR 632-33). Accordingly, Russo cleared the article prior to the journal peer review and did not think the article had policy implications at that time; she believes that Claimant changed the language of the article so that it raised policy implications after she cleared it (TR 933-34; CX 144, at 3; CX 43, at 9; CX 45, at 53-54; *see* CX 1, at 144). As a result of this failure, someone at NERL informed Russo to follow the "Longest memorandum" when reviewing scientific or technical papers (*see* TR 935).

On October 28, 1999, Noonan wrote Hal Zenick, the Acting Deputy for Science at EPA, telling him that she was "so mad about this [that she] could spit nails" (CX 43, at 8, 17; CX 44, at 12). She also informed him that the publication of this *Nature* article without a NERL review put Fox in a bad position to go before the HSC the following week and that EPA was in "damage control mode" (CX 44, at 12; CX 43, at 19-20; TR 941-42). Noonan relayed this same information to Foley orally (CX 45, at 31-33). Noonan was also upset that UGA issued a negative press release regarding this matter and EPA without first consulting EPA; but, she testified that Complainant was not wrong when he worked with UGA to formulate the press release (CX 43, at 18-19; CX 44, at 12).

Later that year, Complainant received an award at EPA's Science and Technology Achievement Awards for his work on the *Nature* article (CX 43, at 16-17; CX 45, at 29; *see* CX 1, at 88-89).

On March 20, 2000 the OIG issued a report on the "Agency's oversight compliance and enforcement activities related to biosolids" (CX 52, at 109-10). OIG had initiated a survey of EPA's biosolids program two years earlier at the request of OWWM (CX 52, at 110-11).

Following the publication of the *Nature* article, the staff of the HSC contacted Complainant regarding holding hearings on Complainant's Rule 503 concerns (TR 150). On March 22, 2000, the HSC held a hearing regarding Rule 503 (*see generally* CX 59). Complainant was responsible for bringing these issues before Congress, including informing it about the facts of the *Marshall* case, about EPA's attempts to lobby states away from implementing stricter sludge rules, about EPA's "attempt[s] to discourage a CDC scientist from investigating the health effects of land applied sludge," and about Fox's letter that disseminated non peer reviewed research (TR 152-57, 159; CX 59, at 261). There was no evidence presented that any other EPA employee talked with Congress about these matters (*see* TR 156). EPA was aware of all of Complainant's contacts with Congress because he always tells Russo and, to his knowledge, she forwards that information up the chain of command (TR 151, 154, 157; *see also* CX 45, at 12, 35).

The HSC hearing

> address[ed] whether the EPA in its management of the Part 503 Sludge Rule, is failing to foster sound science with an open exchange of ideas . . . and . . . explore[d] allegations that the EPA ignored or worse, harassed scientists and intimidated private citizens when they expressed concerns about EPA's sludge rule and the science behind that rule.

(CX 59, at 3). During the hearing, Congressman Elhers condemned Rubin for referring to Complainant as a "quack" and his Rule 503 research as "crap" in an email to Hunter Rawlings (President of Cornell University) and Ronnie Coffman (Director of Research and Associate Dean of Cornell's College of Agriculture) (CX 49, at 245).[15] Rubin does not remember drafting this email, nor why he drafted it, but acknowledges it (CX 52, at 246-47, 249). He testified that he did not make these references to Complainant as part of his official EPA duties (CX 52, at 251).

The HSC hearing also discussed the issue of a senior scientist at OW sending letters to farmers threatening to regulate manure, and letters with abrasive tones to private citizens, who expressed their concern about biosolids to EPA (CX 59, at 266-68). Complainant alleged that this type of behavior persisted at EPA (TR 299). In response to Congressional questioning, EPA stated that it was

> not aware that the allegations raised regarding the letters . . . [were] widespread throughout EPA. Therefore, [it did] not believe that addressing these allegations Agency-wide [was] warranted under the circumstances. Within the Office of Water, [it] sent an internal memo to all employees reminding them of their professional obligation to treat all points of view with respect . . . .

(CX 59, at 267-68). Complainant believed that had there been an Agency-wide policy regarding this issue, rather than just an OW memorandum, then some issues in the instant case would never have arisen (TR 299-300). These hearings prompted Rubin to check with his OW supervisors prior to responding to any inquiries made regarding biosolids (CX 52, at 60-61). As a result of this March, 2000 hearing, EPA commissioned the National Academy of Sciences ("NAS") to undertake a study of the legitimacy of the scientific basis of Rule 503 (TR 160; *see* CX 46, at 3-4; CX 140, at 29). Ellen Harrison, Director of Cornell University's Waste Management Institute, was a member of the NAS panel that performed this study (CX 140, at 3-4, 10-11, Exhibit 1).

In April, 2000, Complainant made a presentation about his biosolids research at the National Science Conference in College Park, Maryland (*see* TR 1103). Walker was in attendance at this presentation (TR 1103). Walker testified that he had recommended researching odor and pathogen issues related to biosolids in 1998, prior to hearing Complainant's presentation about the same at this conference (TR 1104-06). Harrison saw Complainant speak at this conference and noted that he "raised issues about gaseous emissions [from biosolids] and their potential for health implications" (CX 140, at 24-25). The audience attacked Complainant "phenomenally" upon hearing his presentation (CX 140, at 27-28). She regards Complainant as

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[15] James Smith, a scientist in ORD, also received this email (TR 1271). EPA officially reprimanded Rubin in writing for sending this email (TR 486-87).

a "hero" for putting forth "reasonable scientific theories, . . . despite the incredible flack he was getting" (CX 140, at 35).

On July 27, 2000, Complainant requested a two year extension of his IPA assignment (CX 1, at 122-23; CX 10; RX 37). EPA granted this extension (RX 38).

On November 20, 2000, Complainant wrote a letter to Williams requesting clarification of UGA's role in the *Marshall* litigation before Complainant could further participate as an expert witness in the litigation (RX 147). Complainant sought this clarification at the request of Arthur Leed, UGA's Associate Director for Legal Affairs, because Synagro had recently subpoenaed UGA employees and contacted UGA's president regarding Complainant's expert witness role (RX 147). In this letter, Complainant noted that his attorney stated "that Synagro has created 'one big mess,' which is now interfering with [Complainant's] relationship with [his] employer" (RX 147, at 2). Synagro's interference with UGA faculty schedules was the "one big mess" that was referenced (TR 311). These aggressive tactics created controversy at UGA (TR 311-12). Following this letter, Williams sought relief from the *Marshall* court for Synagro's aggressive tactics (TR 312).

On January 17, 2001, Complainant entered into a settlement agreement with EPA regarding other whistleblower allegations (TR 261). This settlement agreement involved the three whistleblower complaints that Complainant had filed between December 1, 1998 and December 10, 1999 (*Lewis v. US EPA*, 1999-CAA-12, 2000-CAA-10, 11 (Jan. 17, 2001)). In these complaints, Complainant alleged that EPA created a hostile work environment, failed to promote him, and restricted his media contacts in retaliation for his involvement with protected activities (*id.* at 2). Complainant is not currently seeking monetary damages for any actions taken by EPA prior to the date of this settlement (TR 262).

On March 14, 2001, Complainant wrote a letter to Leed regarding Synagro's listing of Leed as a witness on Synagro's behalf in the trial of the *Marshall* case and an upcoming disciplinary hearing regarding Synagro's counsel (RX 148). In this letter, Complainant expressed his disagreement with Leed's representation to Synagro that Complainant's sludge research was "unrelated to University business" (RX 148; TR 313-14). Synagro was distributing, to various people involved with the biosolids issue, Leed's letter that made this representation (TR 314). Complainant was concerned about this distribution because he believed that parts of Leed's representations were based on Synagro's erroneous representation of Complainant's IPA (TR 315). Synagro had obtained that information regarding Complainant's IPA from UGA through the Georgia Open Records Act (TR 315). Complainant objected to Synagro's Georgia Open Records Act request because such documents would not have been available under the Freedom of Information Act ("FOIA") (TR 315-16).

On March 27, 2001, Russo faxed Foley and Morris a copy of *Resolving Conflicting Standards for Disinfecting/ Sterilizing Flexible Endoscopes*, an article that Complainant wrote for publication in *Practical Gastroenterology* (RX 70; TR 869-70). On the fax cover sheet, Russo acknowledges that she is forwarding this manuscript to their attention because Complainant is the author and that the article has no EPA policy issues (RX 70). Russo testified that she is supposed to send all of Complainant's work products to Foley, Morris and OGC for their review (JX 1, at 10). She maintains a log of her correspondence with NERL regarding

Complainant (JX 1, at 123). She began this practice when she was reprimanded for not calling to let Foley know that she had sent him the 1996 *Nature* commentary written by Complainant, which Foley was not aware that she sent (JX 1, at 10-13). Foley testified that NERL has a policy requiring employees to fax to OGC any material relating to Complainant "because a number of things that David has been involved in had policy implications" and EPA wanted a "heads up" so they can properly answer questions based upon that material (CX 45, at 12-13). He testified that EPA does "this for a lot of subjects that are sensitive," but he does not recall another current employee whose information is *all* sent to OGC (CX 45, at 12, 20-21, 99).

On April 3, 2001, Morris responded to Russo's March 27, 2001 fax and stated:

> I want to make the following point as clearly as possible: do not forward articles for NERL or ORD HQ review or information solely because they are authored by David Lewis or any other employee. In the future, please forward copies of scientific and technical products, or information regarding important ORD projects and activities following the procedures and guidance contained in the *National Exposure Research Laboratory Policy and Procedures for Clearance of Scientific and Technical Products (STP)*, dated March 1999, the "Heads Up" memorandum from Henry Longest dated July 15, 1998, the memorandum from Gary J. Foley dated April 4, 2000 on the subject of procedures for processing scientific and technical products with policy implications, and any other applicable NERL/ORD policy or guidance.

(RX 71; TR 1011). The "Heads Up" memorandum requested that when scientific or technical papers that may produce national attention are sent to upper management, fact sheets and memoranda accompany the papers (RX 131; TR 873). It also requests that all oral contacts with news media and Congress also get reported to upper management (RX 131; TR 1010). This action should occur within 30 days "of completion of the project, or an important milestone in the project that will involve the release of information that may cause inquiries" (RX 131; TR 873-74). Foley's memorandum informed EPA scientists that fact sheets and memorandum are required 120 days prior to completion or release if a paper will attract significant attention, is peer reviewed or has policy implications (RX 133; TR 874, 952).[16] All Division Directors are required to send these types of papers to upper management (TR 949).[17] Morris testified that during this timeframe she consulted OGC when she received information concerning Complainant and that she consulted OGC prior to sending this April 3, 2001 email (TR 930-31). She testified that she consulted OGC because of Complainant's whistleblower complaints (TR 937). Ultimately, Morris concluded that Russo should have forwarded this article because it may attract media attention, not because Complainant wrote it (*see* RX 71, at 2; TR 952). Because of all of Morris's questions about the article and the procedures that needed to be followed, Russo understood this email to mean that she needs to forward all of Complainant's work products to Morris or she would "probably get in trouble again" (JX 1, at 15).

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[16].Morris testified that Foley's memo came out after this controversy (TR 953). But this controversy arose in March, 2001 and Foley's memo was written in April, 2000.

[17] There is a discussion of the appropriate standard for the Division Directors to follow. Morris testified it was if the Director "believed" the scientific or techinical paper would fall in one of these categories (TR 950-51).

In this April 3, 2001 correspondence, Morris also noted that the Complainant's article lacked the "typical disclaimer" regarding trade names or commercial products (RX 71; TR 875). Morris further noted that the article lacked a disclaimer noting that it did not represent EPA policy and questioned whether the CDC had been notified about the article, since it appeared critical of the CDC (RX 71; TR 875-76). Complainant responded to Morris's concerns on April 6, 2002, noting that he had contacted CDC and that he will revise his disclaimer (RX 72; TR 878).

Following this incident, Morris continued to receive information from Russo about Complainant's articles and media or congressional contacts (TR 938, 946-48; *see* CX 1, at 157; *see, e.g.,* RX 203, 209). However, this was not unusual, as all of the EPA scientists reported their media and congressional contacts to upper management (TR 948).

Simultaneous with the NAS study and his *Marshall* expert witness activities, Complainant was drafting a research article, entitled *Adverse Interactions of Irritant Chemicals and Pathogens with Land Applied Sewage Sludge* ("*Adverse Interactions*"), about Rule 503, which he hoped *Lancet*, a prestigious medical journal, would publish (*see* TR 165, 317; CX 1, at 16). Complainant was the senior author of this research article and wrote it as part of his IPA duties (TR 162-63). Complainant believes that it was the "first and only paper documenting illness associated with the land application of sewage sludge" (TR 164). In the conclusion, Complainant notes that his research indicates a sufficient link between land application of sludge and public health risks that "should be thoroughly investigated with epidemiological studies" (TR 164-65; RX 43, at 9). On May 1, 2001, Complainant completed the research article and, in accordance with ERD policy (TR 625), gave Stancil the article, requesting that ORD provide an expedited clearance review (TR 318; RX 73). He requested an expedited review because he was concerned that Synagro may publicly release the premise behind the article prior to publication, which would jeopardize the paper's publication possibilities (TR 318). Synagro was aware of the premise behind this article because of Complainant's expert witness activities in the *Marshall* litigation (*see* TR 318-21). Complainant also noted in this request that, upon publication, *Adverse Interactions* may generate media attention since most articles that *Lancet* published attracted media attention (RX 73; TR 320).

Complainant also provided a copy of *Adverse Interactions* to Holm for him to review for "both technical microbiological issue[s] . . . and . . . administrative issue[s]" (TR 167-68); and to Janice Simms, an employee at EPA's Athens Laboratory, to log it into EPA's system for tracking purposes and for her to check for an appropriate disclaimer (TR 166-67). In the initial draft, Complainant's disclaimer read: "This paper has been reviewed in accordance with the U.S. Environmental Protection Agency's peer and administrative review policies and approved for publication. Mention of trade names or commercial products does not constitute endorsement or recommendation by the U.S. EPA" (RX 43, at 11). Other individuals to whom Complainant provided copies of *Adverse Interactions* included a CDC scientist expert in the field, another scientist with similar expertise and Harrison, and he did not ask any of these individuals to keep the paper confidential or not to distribute it (TR 348-50). Complainant testified that Harrison was not conducting a peer review and obtained permission from Complainant to disseminate it to others on the NAS panel for informal review purposes (*see* TR 526-27*)*.

On May 11, 2001, ERD cleared *Adverse Interactions* for submission to a publication (TR 168, 172; *see* RX 5, at 3). On May 20, 2001, Complainant submitted *Adverse Interactions* to *Lancet* (TR 329; *see* RX 77). *Lancet* would review it initially for subject matter and then subject it to a peer review, which would consist of sending the article to "scientists in the field to get their technical comments" (TR 168). This type of peer review would fulfill EPA's peer review requirements (TR 169, 669-70). At this time, Complainant was concerned about *Adverse Interactions* passing *Lancet's* peer review because of his lack of control group studies (TR 170-71; 538). Complainant was unable to conduct these studies because to do so would require considerable resources and more scientists; he believed his IPA agreement prohibited him from collaborating with EPA scientists (TR 171; 540). [18] Russo testified that she thought EPA treated Complainant differently because of the addition of this provision in his IPA agreement (CX 1, at 93-95).

On June 4, 2001, there was a trial in the *Marshall* case (RX 41). At this trial, Synagro obtained a copy of the manuscript of *Adverse Interactions* (TR 319, 328; RX 196). On June 14, 2001, the judge in the *Marshall* case placed *Adverse Interactions* under a protective order to prevent Synagro's public dissemination of the article prior to publication (TR 331-32; RX 196; *see* TR 201-02).

After Holm reviewed *Adverse Interactions* he and Complainant decided that Complainant should send it to Dr. James Smith, a Senior Environmental Engineer with ORD in Cincinnati, Ohio and Chairman of the Pathogens Equivalency Committee[19] for the biosolids issue, for review (TR 531, 621, 622, 630-31, 1222-23; *see* CX 84). Smith is not in a supervisory position over Complainant (TR 1225). Complainant forwarded a copy of the article to Smith on May 31, 2001 (TR 176, 1226; CX 84) [20] subsequent to sending it to *Lancet* to minimize the chance of public distribution prior to publication (TR 326; 528). When Complainant forwarded the article to Smith he conspicuously noted in an email, and on the draft of the article, that the article was "Confidential – Not for Public Distribution" (TR 177-79; CX 84, at 1-2). In his career,

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[18] Prior to his IPA, Complainant had begun planning a project with Dr. Samuel Karickhoff using the SPARC computer programs (CX 41, at 42-43). In 1999, Complainant requested to collaborate with Karickoff in ERD to use SPARC to conduct the control group study but NERL would not permit the collaboration (CX 41, at 43; TR 540-41; JX 1, at 136-37; *see* CX 41, at 31). Russo was surprised by NERL's denial because "it would be very common for people on IPA's from [ERD] to collaborate with their colleagues in [the ORD] lab and use any of [ORD's] models" (JX 1, at 136). Complainant testified that Russo and Holm left him with the impression that NERL would not permit any other collaboration and, therefore, Complainant did not request any others (TR 541-42).

[19]The Pathogens Equivalency Committee "evaluate[s] new sewage sludge treatment processes and their ability to meet the requirement for treating sludge either to what's a Class B degree or a Class A" (TR 1223).

[20] Complainant testified that he sent this article to Smith because of Morris's email (TR 177, 322-23). However, his email to Smith indicates that he was sending the article pursuant to Holm's suggestions (CX 84). Further, Morris's email was dated June 14, 2001 and Complainant sent this article to Smith on May 31, 2001 (*compare* CX 78 *with* CX 84).

Complainant had never placed such a heading on an article that he submitted for review (TR 328). He stated he did so in this instance because chances of publication diminish if an article is publicly distributed prior to publication and he was concerned that OW might distribute it outside EPA (*see* TR 178). Complainant also limited Smith's distribution of the paper to "appropriate individuals" within EPA and did not request a formal peer review (TR 178, 324, 532; CX 84; RX 43). Smith regarded this request as an informal colleague to colleague review, and not a more formal peer review (TR 1273).

Shortly after receiving this email, on or around June 12, 2001, Smith notified Lynn Ann Paris, his immediate supervisor, of Complainant's request, reminding her of Complainant's past litigious activities (TR 1226-27; RX 45). Smith also contacted OGC regarding Complainant's request (TR 1289). Smith recalled that in 1999 there was controversy, which resulted in litigation, regarding a comment that Complainant made in *Science News* regarding "the possibility of grease balls harboring E. coli forms . . . making it more difficult to enumerate in bioanalyses such as the analyses that are used to test sewage sludge" (TR 1227-28). That same day Paris responded to Smith discussing her evaluation of the paper (RX 46). Thereafter, on June 18, 2001, Paris emailed Smith, informing him that she discussed the review issue with Hugh McKennon, NERL's Associate Director for Health, who instructed Smith to review the article and fill out a "Technical Manuscript Review Form" (TR 1229-30; RX 47). This form is "given to technical people that are asked to do peer reviews," which meant that Smith was to perform a peer review of the article (TR 1229-30). Holm testified that he coordinated the peer review of *Adverse Interactions* (TR 649). Between June 18, 2001 and June 28, 2001, Smith received several voice mail messages and phone calls from Holm in which Holm requested that additional people review Complainant's article (TR 1231). Holm and Smith agreed that Smith would ask Robert Brobst and Robert Bastain to participate in the EPA peer review of *Adverse Interactions* (TR 1231-32). Both were members of Smith's Pathogen Equivalency Committee (TR 1232). Bastain is an EPA employee responsible for "both land treatment of waste waters as well as looking at land treatment of sludge" (TR 1223-24). Brobst is the Biosolids Coordinator for EPA in Denver, Colorado (TR 1224). Smith did not think that he was conducting the peer review, just coordinating it, and that the review was NERL's responsibility (TR 1232-33; *see* RX 47).

When Smith asked Brobst and Bastain to participate in the peer review, Walker was present (TR 1231, 1234). During this discussion, Bastain suggested that Walker also participate in the peer review (TR 758-59, 1234). Smith felt obligated to include Walker in the review because Walker heard this suggestion (TR 1234-35). Because Holm, Smith and Complainant seemed to want to have EPA employees review the article, Smith did not see a problem with including Walker in the review (TR 1234-35). Smith had known Walker since 1976 and felt that Walker was technically qualified to peer review the article because he was a soil scientist, had worked with biosolids for an ample amount of time and would "give a good review on the policy, the soils, [and] the chemical side[s]" of the article (TR 1283). Walker did not believe that his role as quality assurance and quality control manager obligated him to conflict himself out of peer reviewing *Adverse Interactions* (TR 1137). On July 3, 2001, once Brobst, Bastain and Walker agreed to conduct the review, Smith gave them the article, Complainant's cover letter and accompanying figures on computer disks (TR 1235, 1275; *see* RX 45). On July 3, 2001, Smith emailed them instructing them to finish the review as soon as possible and forward their finished work product to Holm (CX 49; TR 1234).

Holm delegated the coordination of the peer reviewers to Smith (TR 649, 651-52). Smith was not sure how formal this peer review was, considering *Lancet* was conducting its own peer review of the article and because he did not maintain a formal peer review file for it (TR 1285-86). Holm agreed that this "internal" peer review was an unusual process because the article was simultaneously submitted to a journal for peer review (TR 653); however, EPA has subjected a small number of other papers to a similar process and they all dealt with controversial subject matters (TR 653).

Holm thought that Complainant's concerns expressed in *Adverse Interactions* regarding Rule 503 questioned EPA policy and may draw media attention (TR 629). Accordingly, he requested that Complainant draft a fact sheet and memorandum to accompany *Adverse Interactions* for review at NERL (TR 333-34; *see* TR 880-81). On May 30, 2001, while Complainant's paper was under review at *Lancet*, Holm forwarded the article, along with a fact sheet and draft transmittal memorandum, to Morris and Foley for their review (RX 76; TR 864-65, 878). Morris only reviews scientific or technical papers that may "draw media attention, Congressional attention, public interest attention, [or] if it has policy implications" (TR 881). Morris consulted with OGC before responding to Holm (TR 930-31, 956, 959). On June 14, 2001, Morris responded to Holm and Russo and suggested that Complainant share the article with OW for "review and comment" because "[t]he subject of the paper appear[ed] to relate to an area within [its] responsibility" (RX 78; TR 882-83). Morris testified that she only wanted Complainant to *communicate* with OW about the article and that had she wanted a "peer review" she would have used that language (TR 883-84, 1017). Complainant had already sent the article to Smith for review prior to Morris's suggestion (TR 174). However, Complainant was troubled by Morris's request

> [b]ecause the peer review process should be free of reviewers [with] . . . significant conflicts of interest and requiring a research article from ORD to be peer reviewed within an office that writes a regulation . . . of which the scientific article is critical of . . . presents a . . . clear conflict of interest and opens the door . . . for the program office, OW, basically to quash th[e] research

(TR 174-75, 338). Complainant added that he was also concerned that individuals at OW may inappropriately distribute or handle the article prior to publication, or possibly share it with Synagro (TR 337-38). He expressed these concerns to his management, leaving it to Russo and Holm to communicate the concern to Morris (TR 346). His managers did not contact Morris because they believed her request was clear (JX 1, at 28). Morris's email never uses the language "peer review," but Complainant testified that once OW received the article to review that they would conduct a peer review that would affect the formal clearance process (RX 78; TR 339-40). Russo testified that Morris's use of the word "review" is ambiguous (JX 1, at 27). Complainant testified that a peer review at OW could potentially halt the publication of *Adverse Interactions* (TR 347-48). This type of review, by a program office, is not part of NERL procedures for this type of paper, which just requires journal peer reviews and approval from the Division Director (TR 633-36; RX 132, at 18, 27; *see* JX 1, at 26). Holm is not aware of another scientific or technical paper being subject to this type of review (TR 634). Russo testified that if a scientific or technical paper affects another program office then she would forward a copy of that paper to that program office when the paper was finished, not for review (JX 1, at 26). She

then testified that if a paper affects one program office, depending upon the research and the researcher, ORD may send it to another program office for review or coordination (JX 1, at 29-33). Smith testified that if an article in one office affected another program office it was EPA policy to make the affected program office aware of the article, so coordination with the affected program office was appropriate before publication of the article (TR 1242-43). Complainant believed Morris's request was discriminatory and he thought Morris's discriminated against him because he raised biosolids issues (*see* TR 339).

Morris further suggested that if coordination with OW had not taken place then Complainant should alter the disclaimer, to read as follows:

> This paper reflects the results of the research project performed at the Department of Marine Sciences, University of Georgia (UGA) under an Intergovernmental Personnel Act assignment between U.S. Environmental Protection Agency (EPA) and UGA. It does not necessarily reflect the views of EPA, and no official endorsement should be inferred. Any mention of trade names or commercial products does not constitute an endorsement or recommendation.

(RX 78; *see* TR 172-74, 885). Morris gave Complainant this option because she did not want to hinder publication of the article (TR 885). Complainant did not have a problem with disclaiming that the article "does not necessarily reflect the views of the EPA" (TR 173). However, Complainant testified that the language "no official endorsement should be inferred" appeared to be "designed to support Synagro's argument that EPA does not support or endorse [his] work" (TR 173). Complainant testified that the "no endorsement" language can be inferred from the rest of the disclaimer (TR 340-41).[21] Complainant further testified that this "no official endorsement" language "appeared to be drawn from material that Synagro has been distributing in [its] 'White Paper'[22]" and that he had never seen such language on any other disclaimer concerning him (TR 173, 341). But since Synagro had not yet released the "White Paper," Morris could not have taken the disclaimer language from it (*compare* RX 78 *with* RX 67). The NERL Policy and Procedure Manual suggests similar language for disclaimers in project reports and proceedings of technical conferences and symposia, papers that are not peer reviewed or not funded by EPA (RX 132, at 12-13; TR 640-41; *see* TR 341-46). Complainant also believed that Morris's suggested disclaimer was too lengthy and would require subtraction of the actual text of the article (TR 173-74). Morris's suggested disclaimer was not standard EPA policy for a peer reviewed article and Holm had never seen a request for a similar disclaimer for a peer reviewed paper (*see* TR 640-41, 644-45). However, Holm acknowledged that Morris could deviate from the disclaimers listed in the NERL Policy and Procedure Manual (TR 710-11). This was the first time that Morris had requested that an author use this language in a disclaimer (TR 960). It should be pointed out that the Complainant has not suggested that Morris's disclaimer was in any way inaccurate.

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[21]Since Complainant concedes that the "no endorsement" language is implicit in this disclaimer, it is hard to understand how the Complainant can object to making the disclaimer explicit.

[22] *See infra* p. 29 (providing a discussion of the "White Paper").

In this correspondence, Morris also noted that she "assume[d] that this paper went through the clearance process at ERD" (RX 78). This surprised Holm because NERL policy was to clear a paper after it went through a peer review process at a journal (TR 632).[23]

On June 19, 2001, Complainant wrote a response to Morris's June 14, 2001 email (RX 80). In this response, Complainant notes that he "would very much like to incorporate [into his article] any suggestions/ corrections Smith/Rubin/Walker or others at EPA may have" and that he has had "all of the members of the National Academy of Sciences panel currently assessing the science behind EPA's 503 rule" review the article (RX 80; TR 350-52).

On July 5, 2001, Brobst submitted his peer review (RX 50). He noted that the article was "[a]cceptable after major revision" and that "[t]he lead author has at least a [*sic*] appearance of bias that was not disclosed" (RX 50). Brobst further noted that the article "lacks basic information and understanding of wastewater treatment and solids production and treatment, that is required for understanding of the information presented" (RX 50).

To effectuate his peer review, Walker skimmed *Adverse Interactions* and then, on July 9, 2001, gave it to Dr. Patricia Millner, a microbiologist at the USDA, to review (TR 759-60, 809; RX 52). His supervisors were unaware of this exchange (TR 762, 1144). Walker realized that the paper was marked confidential, but he regarded Millner as a colleague and thought that her input would be helpful (TR 761). Walker frequently asks colleagues to assist him in peer reviewing papers (TR 761). When reviewing *Adverse Interactions* Walker considered the impact its publication would have on the biosolids community, but felt that if it was a scientifically sound publication it would be justified (TR 1125).

On July 10, 2001, Millner provided her comments on *Adverse Interactions* to Walker (*see* RX 53; TR 762). Walker testified that he used these comments, with Millner's permission, as part of his peer review of *Adverse Interactions* (TR 762, 1142, 1145-47). Walker sent his peer review to Smith on July 11, 2002 without citing Millner's input (RX 55; TR 763-64, 771, 1155). Walker concedes that his peer review was virtually word for word Dr. Millner's review, with the exception of the addition of his conclusion that "the methodology including the evidence and analysis as presented are significantly flawed and do not support the conclusions" (TR 1139, 1154-55; *compare* CX 55 *with* CX 53; *see also* TR 764-65, 1151; RX 65). Walker also found that Complainant needed controlled studies to make the conclusions that he asserted in *Adverse Interactions* (TR 1141). Walker did not discuss this review with Complainant's supervisors (TR 765-67). He also did not share his peer review with anyone outside of the agency, but did share it with his OW supervisors because of the ongoing NAS review (TR 764). Walker testified that based on his experience in the biosolids arena his peer review would be given serious consideration (TR 1152). Complainant testified that he would have asked Smith to reiterate the confidentiality of the article to Walker had Complainant known that Smith was going to give the article for Walker to review (TR 532).

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[23] However, Holm testified that it was ERD policy to review papers prior to a journal peer review (TR 632-33). Morris may have made this statement because of her awareness of ERD policy.

On July 10, 2001, Synagro wrote Linda Fisher, Deputy Administrator for EPA, requesting clarification of EPA and Complainant's role in the *Marshall* litigation and inquiring whether Complainant has overstepped his IPA with his expert witness participation (RX 150). UGA received a copy of this correspondence (*see* CX 11).

On or about July 11, 2001, *Lancet* rejected *Adverse Interactions* for publication, suggesting the Complainant submit it to a specialty journal instead (TR 352, 542; *see* RX 190, at 2). According to the Complainant, one of *Lancet's* peer reviewers was very negative about the article and appeared to be a proponent of biosolids, while the other commented on technical issues and appeared favorable to publication (TR 543). Further, one of the reviewers said that the article needed an epidemiological study and a control group (TR 352, 358; RX 56). Upon receipt of the rejection and the journal's two peer review comments, Complainant testified that he threw them out because he was upset, a contention that seems far-fetched (TR 353-54, 542, 543-44). Complainant informed one member of the NAS panel of *Lancet's* decision (TR 354-55). Shortly after allegedly discarding the *Lancet* reviews, Complainant informed Russo and Holm of his actions (TR 355). Complainant testified that Russo and Holm informed him that there was no policy requiring that he keep the materials (TR 356, 546).[24] Holm testified that a scientist *should* make peer review comments part of the file of the paper, but this was not part of NERL's written policy at that time (TR 626, 637; RX 132, at 27). No one has requested that Complainant obtain duplicate copies from *Lancet* of the peer review comments, despite Complainant's offers (TR 546). Following these reviews and comments, Complainant consulted Holm about cooperating with OW to obtain support for an epidemiological study (TR 666; RX 60, at 3). However, Holm does not believe that Complainant ever sought funding from EPA, OW or ERD for this study (TR 709-10).

Also on July 11, 2001, Walker emailed his peer review of *Adverse Interactions,* without a copy of the article, to Smith, Michael Cook (the Director of OWWM), Alfred Lindsey (Deputy Director of OWWM) and Eliot Tucker, all members of Walker's management chain, and Bastain and Brobst, the other peer reviewers, with a cover letter labeling the article "poor quality" and "alarmist" (RX 55; TR 1153, 1155, 1180-81).[25] He further wrote that he "hoped that the peer review comments which Jim Smith, [he], Bob Bastain, and others have now provided will have an impact on the fate of this manuscript" (RX 55). Walker did not mark this email confidential, but later requested that the recipients keep it confidential (TR 1181-82). Walker does not believe that sending this review to his managers would harm Complainant's reputation because they were Walker's managers and had no affect on Complainant's employment (TR 1176-77). He did not know if it would harm Complainant's reputation in the EPA community (TR 1178-79).

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[24] It has since become EPA policy to keep these types of documents (TR 546).

[25] Walker also thought that the Cornell Waste Management Institute's paper, *Case for Caution*, was "alarmist" (TR 853, 1124; CX 137, at 5). Walker testified that he would not classify a paper as "alarmist" if it was based on sound science (TR 853-54). Walker believed that *Adverse Interactions* was alarmist to laypersons (TR 855, 1092-93, 1101, 1124). However, he believed that if a paper is alarming to the public but scientifically sound it is publishable (TR 1125).

That same day Smith emailed his and Walker's peer review comments to Holm, who, in turn, gave the comments to Complainant (RX 54, 55). Smith copied Paris; Dan Murray, the Division Director for the Technology, Transfer and Support Division within NERL; and Hugh McKennon, Director of the National Risk Management Research Lab (TR 1230), on this email because he wanted them to know that he had reviewed the article as he was instructed to pursuant to a directive (TR 1236, 1240-41; RX 54). In his review, Smith noted that the paper presented a biased view and that it is only acceptable after major revisions (RX 54, at 17-18; TR 1237-38). At this point, Smith was concerned that *Adverse Interactions* was sent to *Lancet* for publication because it suggested, without a sufficient scientific basis, that EPA's biosolids policy was bad and could impact the future of biosolids (TR 1240, 1260-61). Smith testified that reading the conclusion suggests the need for additional research, although he notes that he is "not sure that that is the way this article initially was viewed" (TR 1266).

Still on July 11, 2001, Complainant emailed Smith thanking him and the reviewers for their comments and stated that he would review the comments, address the suggestions and send Smith a revised manuscript (RX 56; TR 352-53). Complainant also informed Smith that *Lancet* rejected the article for publication, noting the need for an epidemiological study with a control group (RX 56).

Most of the issues discussed in *Adverse Interactions* relate to the same subject matter as Complainant's expert witness reports for the *Marshall* case (TR 162, 1158). In July, 2001, the *Marshall* trial was underway in New Hampshire (*see* TR 185). On July 9, 2001, Robert O'Dette, the Executive Vice President of Government Relations, Compliance and Technical Services for Synagro, had lunch with Walker. Walker and O'Dette were business friends for over 20 years, and both were on National Biosolids Partnership ("NBP") Committees and frequently met to discuss issues of interest to NBP when both are in the D.C. area (CX 106;[26] *see* TR 1156-58). At the time of this July 9, 2001 lunch meeting Walker knew about the *Marshall* case and Synagro's dismay that Lewis was testifying for the Plaintiff in that case (TR 1157-58). O'Dette stated that Walker told him he was conducting a *peer* review of Complainant's article regarding the health impacts of Class B sludge being written for the medical journal *Lancet* (CX 106), whereas Walker testified that he did not use the term "peer review" nor did he disclose the substance of the article nor where it was being submitted for publication (TR 769-70, 1158-59, 1161). O'Dette also stated that on July 11, 2001 Walker requested information about Synagro's biosolid spreading operation that was at issue in the *Marshall* case to aid in his peer review (TR 1159); Walker agrees that he asked O'Dette for this information, but states that he asked O'Dette for it at the July 9th lunch meeting (TR 1159, 1168-71)

Walker testified that, at Cook's request, he met with Cook, O'Dette and Alvin Thomas, counsel for Synagro, for lunch on July 10, 2001. He again explained that he was reviewing Complainant's article and asked O'Dette for information to aid in his peer review (TR 769-70, 810-13, 1162-63, 1165-66; CX 109, at 9). Walker testified that they all met because Synagro was concerned about how Complainant's EPA employment affected his role as an expert witness in the *Marshall* case(TR 1164). Further, Synagro was concerned because it had requested an EPA expert witness for the *Marshall* case and was turned down (TR 1164-65; *see also* CX 52, at

[26] CX 106 is an affidavit executed by O'Dette on July 13, 2001.

233). Walker testified that he wanted to do something to deal with this situation but that he did not "think [it was] probably appropriate for [EPA] to be testifying in a lawsuit" (TR 1167-68).

As a result of Walker's request, O'Dette sent Walker a partial copy of a transcript from the Marshall case (TR 1168, 1175-76). On July 12, 2001, Walker informed O'Dette that he was not using Synagro's input to draft the peer review comments (CX 106).

On or about July 18, 2001, Walker and O'Dette attended a biosolids meeting in Milwaukee (TR 1171; CX 107). Thereafter, on July 23, 2001, O'Dette executed another affidavit for the *Marshall* case (CX 107). In this affidavit, O'Dette stated that he had dinner with Walker on July 18, 2001. During that dinner, Walker again discussed Complainant's "confidential" article, "said that he ha[d] 'torn up' the draft paper in his peer review," and that at least one other peer reviewer was critical of the article (CX 107). Walker verified that this meeting took place. Although he denied saying that he "tore up" the article, he admits that he told O'Dette that he was critical of it (TR 771, 772, 1171-72). He also admits telling O'Dette that there were two other reviews critical of the article (TR 1173). He did not inform his supervisors that he was meeting with O'Dette (TR 773). At this point, Complainant, knowing of the affidavits because they were executed in the *Marshall* case, allegedly was concerned that *Adverse Interactions* would be publicly disseminated, ruining his chances of publication (TR 190). Following receipt of both affidavits, the judge in the *Marshall* case ordered Synagro to cease contact with EPA employees (TR 364). Walker admitted that he did not use good judgment when he contacted O'Dette about obtaining information (TR 1174). Complainant never gave Walker permission to disseminate *Adverse Interactions* to any third parties (TR 187, 189).

Following receipt of O'Dette's affidavits, Complainant contacted Judy Vanderhoef, Projects Managers in EPA's OIG (TR 248; CX 96), to initiate an investigation of Walker's peer review (TR 189). He provided her with copies of the affidavits (TR 191). These affidavits led him to believe that EPA was aiding Synagro's defense in the *Marshall* case (TR 461-62). On July 23, 2001, Complaint forwarded a chronology of events regarding *Adverse Interactions* to Vanderhoef (RX 196; TR 194).

Complainant also initiated an OIG investigation into the peer reviewer selection process, alleging that Walker was not qualified to peer review *Adverse Interactions* because he does not have a scientific background in the subject matter of the article and because he has a conflict of interest (TR 228-29). Walker is an expert in the biosolids area but not in infectious disease control, microbiology or epidemiology (TR 1135). On the other hand, Complainant agrees that Millner was technically qualified to review the article (TR 360). Walker submitted his peer review to Smith on July 11, 2001 without a copy of Millner's comments for the peer review record (RX 55; TR 1129). Walker also did not include the information received from Synagro, because it was not used in his peer review, nor did he document his meetings with Synagro or discussions with Millner for the peer review record (TR 1129-31). Complainant alleged that Walker's peer review was unacceptable because it was not his work (TR 234). Complainant never complained that Smith had shared his critical peer review with his supervisors (TR 1241). Walker testified that in retrospect he should have obtained permission prior to contacting Millner and that he should have documented his meetings with Synagro (TR 1130-31, 1144). Walker did

not see the need to provide Millner's review for the record because he incorporated most of it in his review (TR 1151).

During the period of the *Marshall* litigation, the OIG investigation of EPA and Walker and the NAS study were all ongoing, Complainant testified that Synagro was making public statements about him (TR 191-92). It was stating that EPA did not support his Rule 503 research, and that Complainant's IPA was an illegal misappropriation of government funding (TR 192). Further, Synagro attacked his qualifications regarding biosolids (TR 192). On July 10, 2001, Synagro wrote a letter to Linda Fisher, Deputy Administrator at EPA, and Leed, the UGA attorney, inquiring about the legality of Complainant's IPA (RX 197, at 5; TR 193, 434). Complainant has presented no evidence indicating that this letter was distributed to anyone other than these parties (TR 434). On July 16, 2001, Synagro wrote another letter to Robert Fredrich, Deputy Associate General Counsel at EPA, accusing Complainant of misusing his IPA and UGA resources (RX 197, at 5; TR 195). Although EPA admits that "[t]o [its] knowledge, Synagro's specific concern that Dr. Lewis had violated the terms of his IPA was without merit" (JS 10), EPA did not respond to Synagro's letter. Complainant stated that because he believed that if EPA agreed with Synagro he would be subject to criminal prosecution for researching outside of the scope of his IPA (*i.e.*, misappropriation of government funds), EPA's lack of response to Synagro's inquiries concerned him (*see* TR 221-22).

On July 25, 2001, Complainant emailed Vanderhoef regarding his intentions for the *Adverse Interactions* article (RX 190). He told her that efforts to perform the recommended epidemiological studies were unsuccessful, contributing to his decision to remove the patient information from *Adverse Interactions* and shortening the paper for "a different type of journal from an environmental modeling point of view" (RX 190, at 2). Complainant stated he could have stressed the environmental factors in the paper more, omitted the epidemiological study and resubmitted the article to *Lancet*, which would comprise a several month process; but, he wanted to get the article out quickly to avoid public dissemination of the article prior to publication (TR 363-64). However, since *Lancet* had rejected the article at least in part due to the lack of an epidemiological study, it is unclear why the Complainant believed that it would publish a revised article that still lacked an epidemiological study. Complainant does not think that Walker's actions affected *Lancet's* decision to reject the article; however, Complainant testified that Walker's actions did affect what Complainant chose to do with *Adverse Interactions* following *Lancet's* rejection (TR 241-42). Complainant testified that he and his co-authors decided to shorten the article and submit it to an online journal for quick publication, because journals are less apt to publish publicly disseminated articles and the affidavits clearly indicated that at least the content of *Adverse Interactions*, although not necessarily the manuscript, had been publicly disseminated (TR 241-43). This appears to be a rationalization on Complainant's part for failing to get the article published in a more prestigious publication.

On July 31, 2001, Complainant forwarded a memorandum to Holm and Russo discussing Walker's inappropriate peer review activities and providing Complainant's response to the "internal" peer review comments (RX 60, at 2; RX 197, at 5; TR 196, 664). The next day Complainant's attorney contacted EPA's OGC requesting that it stop Walker from engaging in any more of the types of interactions that occurred during his peer review (RX 5, at 3; TR 196-97). On August 7, 2001, Walker contacted the individuals that he had shared his peer review of *Adverse Interactions* with and reminded them of the paper's confidentiality (RX 167, 168; TR

767-68). On August 9, 2001, David Guerrero, an attorney in EPA's OGC and Respondent's counsel in this case, responded to Complainant's counsel's letter and stated that Walker, Smith, Brobst and Bastain were reminded of Complainant's confidentiality request (RX 5, at 2; *see* RX 62). Guerrero then noted that OGC will take no further action until the completion of the OIG audit (RX 5, at 2). On August 13, 2001, Complainant filed a complaint against EPA with OSHA (RX 8). Complainant testified that he did not receive the letter from OGC until August 21, 2001 (TR 199). On September 16, 2001, Complainant withdrew the August 13, 2001 OSHA complaint "without prejudice" (RX 7; TR 199).

In July, 2001, NAS issued the preliminary results of its study, which began in March 2000, of EPA's biosolids program (TR 161; *see* CX 90). NAS had a copy of Complainant's expert witness reports and OIG's previous biosolids report when it was reviewing EPA's biosolids program (CX 140, at 30). It concluded that "[t]here is no documented scientific evidence that the Part 503 rule has failed to protect public health," but advocated "additional scientific work . . . to reduce persistent uncertainty about the potential for adverse human health effects from exposure to biosolids" (CX 90, at 12). NAS also discussed the "anecdotal allegations of disease," the advancements in science since the passage of Rule 503 and the need to update the scientific basis of Rule 503 (CX 90, at 12; *see* CX 140, at 33). It concluded that epidemiological studies were needed to determine whether there is a link between land application of sludge and health problems (TR 165; CX 90, at 14). Complainant testified that all of these findings were set forth in *Adverse Interactions* (TR 164-65, 288-90, 291; *see* CX 43, at 9; CX 140, at 34, 38-39). Harrison testified that the NAS panel "did not have the advantage of having David's publications" when it commented about "anecdotal allegations," because his articles were not yet published (CX 140, at 38-39). She further testified that "the Academy [has] a bunch of relatively more objective scientists reviewing all of the data and having heard anecdotal reports themselves also came to the conclusion that there's too many unknowns here and we need to investigate" (CX 140, at 39).

As a result of its study, NAS recommended that EPA "[u]se improved risk-assessment methods to better establish standards for chemicals and pathogens, . . . [e]stablish a framework for an approach to implement human health investigations, " and "[i]ncrease the resources devoted to EPA's biosolids program" (CX 90, at 12; *see* CX 140, at 32). Complainant testified that he raised these issues, as well, in one of his articles (TR 290-91). Harrison does not recall Complainant "focusing on risk assessment particularly" (CX 140, at 39-40). She thought his emphasis was towards researching a "framework for an approach to implement human health investigations" (CX 140, at 40, 42). Russo testified that no one in ORD, besides Complainant, looked into the pathogen issues, but does not know if anyone within EPA had looked at this issue prior to Complainant (CX 1, at 105-06). NAS also highlighted the absence of risk assessments regarding chemical/pathogen mixtures and the absence of inhalation pathway risk studies (CX 90, at 15, 20). Complainant testified that the chemical/pathogen mixture issue was discovered by him in the *Marshall* case and was a centerpiece of *Adverse Interactions* and two other journal articles (TR 292; *see* CX 140, at 40-41).[27] Complainant further testified that he was also the first

[27] Complainant testified that he drafted a homeland security plan based on this concept at the request of Holm (TR 294).

to discover the inhalation pathway risk issue and discussed this issue in *Adverse Interactions* (TR 295-96; *see also* CX 140, at 24-27, 41).

In July and August, 2001, NAS conducted public hearings to gather information and assess its study of Rule 503 (TR 161). At these hearings, Complainant was "publicly identified as one of the causes of the [study] and [the] . . . controversy over sludge" (TR 161). Complainant testified that, at this time, his reputation was important because he was the only scientist who had embarked on this research and if he was "shown to be not credible, then the whole process would essentially collapse" (TR 162). Complainant requested to be a liaison between EPA and NAS for the duration of this study (CX 45, at 148).[28] During this study, Complainant gave Harrison copies of his *Adverse Interactions* manuscript and his *Marshall* expert witness report, with the expectation she would share it with the NAS panel (TR 427-28). But since she testified that the NAS panel did not have Complainant's publications, it does not appear that she did so.

On September 4, 2001, at Complainant's request, Russo wrote Professor Tim Hollibaugh, Acting Director of UGA's School of Marine Sciences, to clarify the scope of Complainant's IPA (CX 9; TR 243-44; JX 1, at 124; *see* CX 1, at 48). Complainant requested that Russo write this letter because he became aware that UGA faculty members were discussing the scope of Complainant's IPA and whether his research and expert witness activities were within that scope (TR 243-44; *see* JX 1, at 124). Russo did not actually compose the letter; rather, she signed off on a prepared letter (CX 1, at 49). In the letter Russo notes that Complainant's biosolids research and expert witness activities are permissible under the terms of his IPA (CX 1, at 49-50; CX 9). Complainant gave this letter to Hollibaugh, among others (TR 244).[29] Russo did not consult Morris prior to writing this letter and Morris was unaware that UGA had any concerns (TR 925-26). Following receipt of this letter, on October 9, 2001, Leed wrote the Deputy Administrator of EPA requesting clarification of these issues and clarification of Synagro's July 10, 2001 letter (TR 245; CX 11). Bridget Shea, Assistant General Counsel for EPA, responded to UGA on January 30, 2002 noting that it told Synagro that it cannot respond to Synagro's inquiries because of Employment Privacy Laws (CX 11). In this letter, EPA also discussed its understanding of the scope of Complainant's IPA (CX 11), but, "never specifically informed UGA that Synagro's concerns that Dr. Lewis had overstepped the scope of his IPA were without merit" (JS 9; *see* CX 11). As was noted above, Respondent has since stipulated that Complainant had not violated the terms of his IPA (JS 10). No one from EPA, aside from Complainant, ever contacted Russo to discuss the scope of Complainant's IPA prior to drafting this letter, despite the fact that he was an employee in her laboratory (CX 1, at 55-57). Russo testified that she would have expected EPA to bring UGA's inquiry to her attention prior to answering it (CX 1, at 58-60, 126). However, upon close inspection of EPA's response Russo agreed that it was an accurate description of Complainant's IPA assignment, but notes that she

[28] Hais testified that Complainant would be valuable to the NAS study but at the time of Foley's deposition EPA had not decided whether it would have a liaison to the NAS study (CX 46, at 7).

[29] Complainant testified that he has also distributed this letter at every public meeting and presentation that he attended from September 4, 2001 until present (TR 458-59).

may have answered the inquiry differently (CX 1, at 127-36). According to Complainant, this is still an issue at UGA (TR 245, 559).

On September 21, 2001, Synagro released a 26 page writing highly critical of the Complainant and his Rule 503 biosolids research, which is generally referred to in this record as the Synagro "White Paper" (RX 68). This document was generated by Synagro in response to the Complainant's participation as an expert witness for the Plaintiff in the *Marshall* case. In the "White Paper," Synagro states that Complainant's "activities regarding biosolids are not sponsored by the EPA" (RX 68, at 1). Complainant testified that this was a misrepresentation (TR 422). Complainant testified that the "White Paper" does not specifically indicate what these activities are, aside from mentioning expert witness activities (TR 423-26); but, because of depositions conducted by Synagro, Complainant testified that he knew that when Synagro referenced "activities" it meant his research under his IPA, expert witness activities and public speaking activities (TR 422-26). Synagro's statement in the "White Paper," that "EPA has directed Dr. Lewis to make clear that this work is not endorsed by the Agency," was true, and Synagro never directly refers to Complainant's IPA activities and EPA's endorsement, or lack thereof, of his IPA (TR 426-27). Synagro also asserts, in the "White Paper," that Complainant's biosolid theories are not backed by sound science and that he does not have "sufficient experience to render a reliable opinion on the safety of biosolids" (*see generally* RX 68). The "White Paper" does not refer to the *Adverse Interactions* article or the negative peer reviews of that article.

O'Dette emailed the "White Paper" to numerous people in the biosolid industry, including EPA employees (RX 67, 68; TR 419-20). Walker was among the EPA employees who received this email (TR 779-80). Smith also received the "White Paper" as a part of O'Dette's list serve (TR 1255). Smith forwarded copies of the "White Paper" to the Pathogens Equivalency Committee because he wanted to keep them abreast of information "which either makes a case for or . . . against land application" (TR 1256). He did a cursory overview of the "White Paper" because it was apparent that it was biased in Synagro's direction (*see* TR 1256). Additionally, at some point during its study of biosolids, NAS was given a copy of the "White Paper"(TR 304); but Complainant presented no evidence that EPA, or anyone affiliated with EPA, gave the "White Paper" to NAS (TR 427). Complainant also testified that an NAS panel member wrote EPA regarding EPA's stance on the allegations contained in the "White Paper" and never received a response, leading NAS to believe that his research was unreliable (TR 304). Complainant believes that NAS concluded that his research was unreliable because of EPA's lack of response (TR 304). Complainant failed to provide any evidence to support this conclusion.

Complainant testified that EPA's failure to respond to Synagro's allegations in this paper affected his reputation (TR 421-22). He appears to assume that EPA has an obligation to respond to Synagro despite the fact that his testimony in the *Marshall* case, which was the catalyst for the issuance of the "White Paper", was not part of his employment either directly for EPA or through his IPA.

Also, on September 21, 2001, Edward Kazmarek, an attorney at Kilpatrick Stockton who was representing Southern Waste, Inc., drafted correspondence regarding the upcoming public hearing in Dawson County, Georgia at which a ban on land application of biosolids was at issue

(CX 112). In this letter, Kazmarek indicated that one of Southern Waste's exhibits was the Synagro "White Paper," which was provided by EPA (CX 112, at 2-3). It is unknown who at EPA provided Kazmarek with the "White Paper" at this time (TR 248).

Walker has had occasion to speak with Carol Geiger, another attorney from Kilpatrick Stockton, regarding questions about land application of biosolids (TR 773-74, 1183).[30] In these discussions, Geiger told Walker that Complainant was scheduled to speak about this issue at an upcoming meeting in Georgia (TR 779). On September 24, 2001, Walker wrote a letter to Geiger on EPA letterhead and stated that "[t]he Agency has no evidence to suggest that the land application of lime treated septage in accordance with provisions [of] Part 503 Rule is unsafe" and that a majority of the scientific community believes that Rule 503 is based upon sound science (RX 173, at 7-8; CX 94; TR 776, 1186). Walker testified that stating that there was "no evidence" may have mislead the people in Georgia because *Adverse Interactions* suggested that Part 503 may be unsafe, but that article was not scientifically sound evidence (TR 1186-87). However, he believed a "majority" of the scientific community believed Rule 503 was based upon sound science because of a National Research Council ("NRC") report and his experience in that area (TR 1189). Walker initially sent a draft of this letter to Geiger, Rubin and Madolyn Domini (the EPA Regional Coordinator in Georgia (TR 775)) to assure that he had properly answered all of the questions posed (TR 777-78, 1185; CX 94).

On the same date, but in a different email, Walker also forwarded Geiger a copy of the "White Paper" because he "wanted to give them the information that [he] had" (CX 96, at 2-3; TR 1184, 1194). He claims to have sent this second email incidentally because it dealt with Complainant, not to provide technical information; he also claims that he did not read the "White Paper" prior to this submission, but I give little weight to this self-serving statement (TR 781-82, 1184, 1213). He did not let his supervisory chain know that he was forwarding this email nor did he forward a copy to Complainant, even though he was aware that Complainant would be at the hearing (TR 782, 806). He admitted it was bad judgment to disseminate a non-EPA document "if there was any possibility of it being considered . . . an agency document" (TR 803, 806, 1184, 1195). The "White Paper" states that "[Complainant's] activities on biosolids are not sponsored by the EPA" (CX 93, at 1; TR 210). Complainant believed that Synagro obtained this opinion from EPA (TR 219). Walker knew that Geiger intended to use these documents against Complainant at the hearing in Dawson County, Georgia (TR 1185).

In addition to Geiger, Walker sent the "White Paper" to several more people, inside and outside EPA (TR 1196-97). He does not specifically recall who or how many, in part because he received the "White Paper" from four or five different sources and it was "common knowledge" (TR 1196-97). On September 24, 2001, Greg Kester, one of Walker's team members and the State Biosolids Coordinator in Wisconsin, emailed Walker, and others, asking for comments about the "White Paper" and asking if anyone agreed with it (CX 119; TR 1198-99). Walker did not respond to this inquiry because he felt that the "White Paper" was obviously Synagro's opinion (TR 1198).

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[30] This is part of Walker's job duties; he receives questions from the regulated industries as well as citizens (TR 774).

In mid-September 2001, the Board of Commissioners for Dawson County, Georgia ("Board of Commissioners"), asked Complainant to speak about his Rule 503 research at a September 24, 2001 public hearing (TR 202-04; RX 8, at 8). Complainant spoke at this hearing in his private capacity (TR 572). Southern Waste was scheduled to have a speaker at this hearing regarding the promotion of biosolids and Geiger represented them (TR 203). UGA faculty, attorneys, staff from Senator Zell Miller's office, State of Georgia representatives and the general public from Dawson and Franklin Counties were in attendance at this hearing (TR 205). On the day of the hearing Geiger provided a copy of several documents, including the "White Paper" and the letter from Walker, to the Board of Commissioners (*see* TR 206). Upon Complainant's arrival at the hearing, a County Commissioner confronted him with these documents (TR 206). One of the other documents provided by Southern Waste at this hearing indicated that EPA had given the "White Paper" to Southern Waste (CX 82, at 76-77; TR 207-08). This information was placed on public record in Dawson County (TR 215).

Additionally, at the September 24, 2001 public hearing, Geiger orally presented the "White Paper" and the Walker letter and stated that EPA had provided both (TR 213). Complainant believed that this representation was taken seriously by the listening audience (TR 213-14). The UGA faculty members present at these meetings transmitted this information to others (TR 256).

These documents and this representation led Complainant to believe that EPA was endorsing Synagro's position, including the position that he committed a criminal act by misappropriating government funds for his IPA (TR 208). He also believed that EPA was providing Synagro with information to build a criminal case against him (TR 208-10).[31] But there is no evidence that any of these suppositions was true; rather, Complainant greatly overreacted to these incidents. That one EPA non-supervisory employee used exceedingly poor judgment in providing information to Geiger is hardly an endorsement of the "White Paper" by EPA or an indication that anyone at EPA was considering bringing criminal changes against him. Nevertheless, he testified that he was emotionally affected, experiencing feelings of failure, self doubt, and lack of confidence, and that his wife and two children have experienced stress because he was put in this position (TR 258). Complainant also testified that he would not have been as concerned about these occurrences if EPA had responded to Synagro's earlier inquiries regarding Claimant's IPA because he felt that "[i]t would have prevented Synagro or anyone else from having a legitimate basis for arguing that EPA endorsed the White Paper . . ." (TR 221). However, the "White Paper" was generated solely in response to Complainant's participation in the *Marshall* case as an expert witness (*see* CX 93), an activity that Complainant voluntarily undertook and which was outside the scope of his EPA employment (*see* TR 132-34, 309-10; RX 145). Although EPA permitted the Complainant to participate as an expert witness in the *Marshall* case (*see* TR 133-34, 309), it did not endorse his testimony; nor was he paid by EPA while he was engaging in this activity. Rather, he was doing this on his own. Complainant has failed to consider why EPA would have any obligation to respond to attacks on his reputation by Synagro or anyone else which are in response to activities which are not engaged in as part of his duties at EPA.

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[31] At this time, Complainant felt that his credibility was especially important because of his roles in the ongoing OIG investigation of Rule 503, the NAS study and the *Marshall* litigation (TR 212-13).

On September 25, 2001, Complainant reported Walker's distribution of the "White Paper" to OIG (TR 218-19, 245-46; *see* CX 96). Complainant attached Walker's peer review to this complaint as an exhibit (TR 471). OIG expeditiously conducted an investigation of Complainant's complaint (*see infra*) (*see* CX 96).

In October, 2001, Franklin County, Georgia held a meeting similar to the Dawson County, Georgia public meeting (*see* CX 29, at 8-9). Franklin County requested that Dr. David Gattie, an assistant professor at UGA and co-author of 10-12 articles with Complainant, speak about his biosolids opinions (CX 29, at 6-9). Gattie worked with Complainant on biosolids issues and spoke at this hearing (CX 29, at 9). Southern Waste was also represented at this hearing and presented the same information that it presented at the Dawson County hearing (CX 29, at 9-13; TR 214-15). Southern Waste's presentation left Gattie with the impression that EPA endorsed the "White Paper" (CX 29, at 13-14). Members of the Franklin County community and attorneys were in attendance at this meeting (CX 29, at 10).

On October 11, 2001, Holm emailed Morris in response to her June 14, 2001 disclaimer request and asked that she preview Complainant's revised version of *Adverse Interactions* ("revised *Lancet* article")(RX 82; TR 888). Holm proposed a new disclaimer because Complainant had factored in OW's peer review comments (RX 82; TR 669, 888).[32] Holm also informed Morris that Complainant will submit a memorandum and fact sheet for the revised *Lancet* article 120 days prior to publication because they anticipated that the new version would generate media attention (RX 82; TR 888-89).

On October 12, 2001, Vanderhoef, on behalf of OIG, wrote Lindsey, Deputy Director of OWWM, two letters regarding Complainant's complaints about Walker's peer review activities and distribution of the "White Paper" (CX 96; RX 172-73). In both letters, Vanderhoef noted that OIG had conducted an investigation, was providing Lindsey with information gathered in this investigation and left it to Lindsey's discretion, because he was Walker's designated management official, to determine whether disciplinary action was appropriate (RX 172-73). This was "standard operating procedures" in EPA (TR 249). Nothing in these OIG letters stated that Walker's peer review activities or "White Paper" distribution were inappropriate (RX 172-73; TR 429-30), although, Complainant testified that based on his review of these letters and accompanying notes he believed that OIG found that Walker's behavior was inappropriate (TR 219, 249, 536). No one had consulted Complainant about what the appropriate corrective action should be (TR 250).

On October 15, 2001, Complainant filed a whistleblower complaint against EPA with OSHA regarding Walker's distribution of the "White Paper" and his meetings with O'Dette (RX 177, at 13; TR 471, 569-70).

Simultaneous with filing the October 15, 2001 complaint against EPA, Complainant filed a complaint with OSHA against Synagro because of its distribution of the "White Paper" (TR

[32] Holm testified that he modeled the new disclaimer for peer reviewed articles on one located in the NERL Policy and Procedure Manual (TR 670-71; RX 132, at 12).

471; *see* RX 176). Complainant believed that Synagro and EPA were working in concert against him, evident by the July 10, 2001 meeting between O'Dette, Walker and Cook (TR 571; *see* RX 109, at 9). On November 2, 2001, OSHA provided Synagro with a copy of Complainant's October 15, 2001 whistleblower complaint against EPA (RX 177, at 13; *see* TR 471). Complainant was upset that OSHA had forwarded a copy of this complaint to Synagro (TR 471-72). On November 4, 2001, Complainant forwarded to Dale Boyd, an OSHA Regional Inspector, a chronology of events regarding Complainant's whistleblowing activities and participation in the *Marshall* case (RX 197; TR 195). On November 5, 2001, counsel for Synagro requested that OSHA send "a copy of the exhibits and attachments" of Complainant's complaint against EPA when OSHA received them from Complainant (RX 177, at 13). On November 14, 2001, Complainant transmitted the exhibits for his complaint against EPA to OSHA; included in these exhibits was a copy of Walker's peer review (RX 177, at 14-20). At some point Synagro obtained a copy of the Walker peer review; however, Complainant settled his case against Synagro and has no knowledge of how Synagro obtained it (TR 477).

Also, in November, 2001, Complainant spoke in an official capacity and "presented scientific data that w[as] not supportive of [Rule 503]" at a conference at Boston University ("BU") (TR 403-06; RX 106, at 2-3). Russo and Complainant agreed that he would speak in his capacity as an EPA employee at this conference because he was discussing his IPA research (JX 1, at 130). However, if Complainant was speaking against Part 503 he would be speaking as an individual because it would no longer be a "technical presentation" (JX 1, at 131-32). A disclaimer is necessary if an EPA employee discusses policy, but not if they issue an opinion in connection with research (JX 1, at 132-33). At this conference and at Morris's request, Complainant orally disclaimed that he was speaking about his research and not on behalf of EPA or to articulate EPA's policy (TR 404-05). Complainant is unaware of another scientist that Morris requires to make this type of oral disclaimer prior to making a scientific presentation (TR 405). Following this presentation, BU requested that Complainant compose an abstract summarizing his presentation (TR 406). Complainant is aware that NERL requires disclaimers on abstracts (TR 407), yet paradoxically at this time ERD, a division of ERD, did not require disclaimer's on abstracts (RX 106, at 3; TR 707). Complainant's abstract was posted on BU's website without a disclaimer and without formal review from ERD (RX 106, at 3; *see* TR 407). Following this posting, Morris suggested that Complainant should have included a disclaimer (TR 407). Complainant considered this suggestion a reprimand and an implication that he had violated policy (TR 407). Holm could not recall another instance where an EPA employee was questioned regarding the absence of a disclaimer on an abstract (TR 707-08). As a result of this incident, ERD now requires disclaimers on abstracts (CX 1, at 96-100).

On December 4, 2001, Bruce Mintz, NERL's Assistant Lab Director ("ALD") for water, emailed the result of the NAS study to various members of EPA for review and comment, noting that a response to the NAS study was scheduled to be at OMB by February and in the *Federal Register* by April, 2002 (CX 156, TR 687; *see* TR 694-95). Walker, Brobst, Rubin and Bastain all were involved in this review and comment (TR 1116-17). Complainant was not among the EPA scientists chosen to review the NAS study, but did provide input into ORD's comments because Russo forwarded the email to him (*see* CX 156; TR 695, 731, 1305). Harrison believed Complainant's participation in this process was "essential" (CX 140, at 75-76). Dr. Larry Burns is the ALD for Goal 8 (area of sound science) and participated in this follow-up biosolids research (TR 687). Burns suggested to Mintz that they should "bring [Complainant] out of the

cold with regards to getting involved in [this follow-up] research" (TR 688). The rough draft of the response to the NAS study indicates at least three areas where EPA scientists suggested to Mintz that EPA include Complainant's research in the response (RX 156, at 8, 16, 29; TR 695-97). Mintz called Complainant to follow up on the comments that Complainant provided to ORD for its response to the NAS study (TR 1305). While Complainant does not know who drafted EPA's response to the NAS study, he does know that they were aware of his work because of the references to his work in the draft response (TR 1326-27).

On December 11, 2001, in response to the OIG investigatory reports, Lindsey took disciplinary action against Walker based on his peer review of *Adverse Interactions* and his dissemination of the "White Paper" (RX 174; TR 430). Lindsey determined that Walker exercised "poor judgment" when he requested information from Synagro for the peer review, commented about his peer review to O'Dette, commented about another's peer review to O'Dette, and provided a copy of *Adverse Interactions* to Millner (RX 174). Further, Lindsey found that Walker should not have forwarded the "White Paper" to outside parties because that action could be interpreted as an EPA endorsement of that paper (RX 174). As a result, Lindsey counseled Walker about these actions, required that all of Walker's discussions and references to Complainant be cleared by supervisors before release and required that Walker contact the attorneys at Kilpatrick Stockton and clarify any misunderstanding regarding EPA's position with the "White Paper" (RX 174-75; TR 784-86, 1201). He was not required to notify any other people to whom he forwarded the "White Paper" that EPA does not endorse it (TR 1197-98). Lindsey was the only person in EPA who counseled Walker regarding these incidents (TR 1087). Complainant was not satisfied with the corrective action that Lindsey took and believes that Lindsey should have consulted him prior to implementing corrective action (TR 430-31). However, Complainant personally has never had to discipline a subordinate and apparently is unfamiliar with the concept of progressive discipline. Nevertheless, he agrees that an employee's years of service and prior performance are important issues to consider when taking disciplinary action (TR 431-32). In addition, when determining the appropriate corrective action, Lindsey took account of the fact that Walker acknowledged his poor judgment and mitigated his actions (RX 175; *see also* TR 1110). The disciplinary actions did not affect Walker's salary or position (TR 1200-01).

In Walker's December 11, 2001 letter to Geiger requesting that Kilpatrick Stockton take steps to clarify that EPA does not approve of or endorse the "White Paper" (CX 95; RX 175; TR 786, 1202-03), Walker also requested that Geiger's law firm clarify this point with all persons who the law firm told that EPA provided the "White Paper" (CX 95; TR 252-53). Complainant does not feel that this corrective action was adequate because sending the letter only to the Southern Waste's attorneys does not remedy the harm their distribution of the "White Paper" had on him and because the attorneys had a "vested interest in . . . not correcting the error" (TR 251-52). Complainant believes that, at the minimum, EPA should have required that Walker send this letter to the Dawson County Commissioners for them to distribute to the persons present at the hearing (TR 251-52). Lindsey did not instruct Walker to contact the people in attendance at the Dawson or Franklin County meetings (TR 1201-02). Complainant also believed that such a letter would have had a greater impact if it was sent sooner than December because it could have contained the damage (TR 260).

On December 17, 2001, Geiger wrote Walker in response to his December 11, 2001 request regarding Kilpatrick Stockton's distribution of the "White Paper" (CX 113; TR 787, 1203). Geiger informed Walker that Kilpatrick Stockton did not represent that EPA "approved or endorsed" the "White Paper" (CX 113). Geiger further told Walker that if he believed that any person present at the Dawson County hearing believed that EPA "approved or endorsed" the "White Paper" then he should contact them personally and inform them of EPA's position (CX 113; TR 254). Walker showed this response to OGC and took no further action (TR 1203; *see* TR 254). Complainant believed that further action was necessary because distribution of the "White Paper" at the Dawson County hearing negatively affected his reputation at UGA (TR 254-55).

On December 18, 2001, Respondent wrote a letter to OSHA in response to Complainant's October 15, 2001 complaint in which it denied that Complainant was subject to discriminatory practices at EPA and answering the questions OSHA posed (CX 14). Respondent noted that Complainant incorrectly asserted that "his IPA assignment would allow him to conduct research primarily or significantly devoted to biosolids" and that EPA agreed to Complainant's IPA to help "him . . . build a reputation in any scientific field" (CX 14, at 7). Complainant believes that these assertions were incorrect and consistent with Synagro's allegations against Complainant (TR 262-63). Complainant claims to have first seen this letter on August 29, 2002 (*see* CX 14; RX 14). Upon reading these assertions, Complainant was in a state of fear because it implied that he misused federal funds and would be subject to criminal prosecution (TR 263-64). Complainant also believes that these statements tainted his credibility (TR 264).

Respondent noted in this December 18, 2001 letter to OSHA that a memorandum of OWWM's disciplinary actions against Walker is "exempt from release under FOIA"(CX 14, at 4; TR 266-67). However, Respondent did not believe that the documents regarding the scope of Complainant's IPA were exempt from disclosure under FOIA (*see* CX 14, at 7; TR 267). Complainant testified that he believed once EPA filed a letter with OSHA it becomes a public record (TR 265). Over the past several years, Synagro has filed several FOIA requests regarding Complainant's activities (TR 265). Therefore, Complainant testified that he believed that Respondent attempted to protect Walker's reputation while "providing an open door to criticisms of [him] and [his] work" (TR 267).

On February 5, 2002, Complainant emailed Russo, Holm and Vanderhoef to inform them, among other things, that he was speaking at a National Whistleblower Center ("NWC")[33] press conference later that week (RX 85). The purpose of the press conference was to discuss the OIG report on Rule 503 (TR 520). Complainant also informed them that he met with four Pennsylvania Department of Environmental Protection agents the previous week to discuss a death allegedly due to sludge exposure (RX 85, at 2; TR 507).

On that same day, Morris sent a memorandum to Longest that Complainant drafted regarding the revised *Lancet* article (RX 84; TR 367, 889; JX 1, at 54). Morris could make any changes she wished to this memorandum prior to sending it to Longest (TR 962; *see* JX 1, at 55-

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[33] Complainant's attorney, Stephen Kohn, is the director of the NWC (CX 88, at 26).

56). In the memorandum, Complainant explained that the first version of the article was submitted to *Lancet*, which suggested submitting it to a specialty journal (RX 84; TR 890). The memorandum informs Longest that Complainant intends to submit the article to the online journal, *Environmental Health*[34] (RX 84; TR 890).

Thereafter, on February 6, 2002, Cathy Murphy, a Management Analyst in ORD, emailed Morris the fact sheet, dated January 2002, that Complainant and ERD had prepared for the revised *Lancet* article (RX 87; RX 106, at 3; TR 706, 891-92). This fact sheet was different than the one he had prepared for the original draft of the article (TR 368; *compare* RX 76 *with* RX 87). The revised *Lancet* article's fact sheet indicates that the research on the article was done under Complainant's IPA with UGA, was on EPA letterhead, and was not marked "draft;" while the original fact sheet makes no mention of Complainant's IPA, was on plain paper, and was marked "draft" (TR 369; *compare* RX 76 *with* RX 87). Complainant understood the word "draft" to mean subject to further revision (TR 374). Moreover, although Complainant states that he prints fact sheets on letterhead if he has any "handy," there is little doubt that he understands that using EPA letterhead implies that EPA has given its imprimatur to the fact sheet (TR 388-89). Holm and Russo reviewed the revised fact sheet and memorandum and approved them for transmittal to Longest (TR 371). There is no policy requirement for a peer review or disclaimer for fact sheets (TR 706-07; *see* 106, at 3). Complainant testified that Russo informed him that after this clearance the fact sheet was no longer a draft (TR 371-72). Complainant did not disclose that he planned to distribute this fact sheet at the NWC press conference.

Still on February 6, 2002, Synagro wrote another letter to EPA inquiring about the scope of Complainant's IPA activities (CX 12; *see* JS 12). In this letter, Synagro refers to peer reviews that found Complainant's research "significantly flawed" (CX 12, at 4; TR 235). According to Complainant, Walker's peer review is the only peer review that describes Complainant's research as "significantly flawed" (TR 235, 236). Morris testified that she saw this letter, consulted OGC and did not show the letter to other EPA employees (TR 998). Russo acknowledged that she never saw this letter and was never consulted regarding a response (CX 1, at 65-68). EPA has not responded to this inquiry "due, in part, to the 'litigious environment' between [Complainant] and EPA" (JS 12). Complainant has presented no evidence that this letter was distributed to anyone outside of EPA (TR 434). Accordingly, Complainant's contention that EPA's failure to respond to this letter has damaged his reputation (TR 277-78) is difficult to fathom. In a follow-up letter, on March 27, 2002, Synagro takes issue with EPA for not addressing its concerns about Complainant's Rule 503 activities (RX 154; TR 464).

At the NWC press conference on February 7, 2002, the fact sheet for the revised *Lancet* article was disseminated (TR 375-76; *see* RX 85, 87). Complainant had given a copy of this fact sheet to his attorney and was aware that it was being distributed at the conference (TR 387; RX 106). Despite having knowledge of this dissemination, Complainant did not make any disclaimers regarding the fact sheet during his presentation at the conference (TR 387). Synagro was represented at this press conference (TR 519). Following this presentation and fearful of possible retaliation, Complainant asked NWC to bolster support from Congress to prevent retaliation (TR 519).

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[34] The article was actually published in *BMC Public Health* (TR 165-66).

On February 13, 2002, the Water Environmental Federation ("WEF") wrote a letter to the Administrator of EPA questioning whether EPA approved Complainant's distribution of the fact sheet entitled, "*Research Article on Staphylococcus Aureus Infections Among Residents Reporting Chemical Irritation With Land-Applied Class B Biosolids*" (CX 102; TR 376; *see* RX 89, at 3). In this letter, WEF also notes that "EPA and external" peer reviews found Complainant's research "significantly flawed" (CX 102; TR 235-36). Morris saw this letter and consulted OGC, but did not show the letter to other EPA employees (TR 998; *see also* TR 702-03). In addition to WEF's February 13, 2002 letter, Synagro sent letters to EPA complaining about Complainant's actions at the NWC press conference (TR 519).

On April 3, 2002, in response to these letters, Morris emailed Russo regarding the dissemination of Complainant's revised *Lancet* article's fact sheet at the NWC conference on February 7, 2002 (RX 90; TR 895-96; *see also* TR 376-77, 520). Morris asked Russo to find out what happened from Complainant and inform him that if he did disseminate the fact sheet then he should have informed the conference participants that it was a draft and "may not necessarily represent the official position of EPA" (RX 90; TR 898-99). Morris emphasized the importance of the disclaimer because the disseminated fact sheet was on EPA letterhead, giving the impression that it was not a draft and that EPA approved it (RX 90; TR 899). Russo agreed that Complainant should have made a disclaimer, whether or not he disseminated the fact sheet, because he was "speaking as a private citizen, not as an EPA employee" (JX 1, at 84-85). Morris also informed Russo that a preliminary review of the fact sheet revealed some items that should be clarified before the fact sheet was issued in a final form (RX 90; TR 899-901, 975). Morris has the authority in EPA to suggest changes (TR 733). In conclusion, Morris reiterated that EPA did not intend to halt Complainant from disseminating whistleblowing documents, but did request that EPA have a reasonable opportunity to review the material prior to dissemination and that the material have an appropriate disclaimer (RX 90).

Longest's July 15, 1998 memorandum requested "notice, well in advance, of the release of information that may result in either Congressional or press inquiries regarding major pending projects or activit[ies] that . . . may result in an inquiry" in the form of a fact sheet (RX 131). Complainant acknowledged that Longest and Morris may have preferred that they review the fact sheet prior to dissemination, but claimed to believe that EPA did not have a written policy requiring this review (TR 383-84; *see also* TR 376-77, 520). Russo, replying on behalf of ERD, told Morris that "[t]o [its] knowledge, there is no requirement for official clearance of [the fact sheet and memorandum], nor is there a requirement for a disclaimer" (RX 106). Although technically Complainant and ERD may have been correct (*see* RX 131), it is apparent that fact sheets did not need approval or disclaimers because fact sheets were not intended to be distributed to the public. Rather, fact sheets were intended for internal use within EPA (*see* RX 110).

EPA has responded to WEF's letter, however, it did not address the "significantly flawed" statement (TR 238). It did not occur to Morris that the failure to address this statement could harm Complainant's reputation, and she did not investigate where WEF got the term "significantly flawed" (TR 1001, 1005). Complainant believes that EPA should have corrected the "significantly flawed" statement "[b]ecause [it] was aware that the basis for the significantly flawed [peer review] assessment . . . was founded on . . . an improperly done peer review that

had conflicts of interest" (TR 238, 276). He believes that EPA's lack of clarification of this statement harmed his reputation and his standing at UGA because it allowed WEF to "disseminat[e] false information based on that improper review" (TR 239, 240). Complainant believed this lack of response clarified that EPA endorsed Synagro's position and he allegedly spent $50,000.00 to have NWC develop and distribute a response to these issues, shifting Complainant's time from working on research to working to extinguish Synagro's allegations and EPA's alleged endorsement of such (TR 268-69). Complainant also believes that Walker provided WEF with the "significantly flawed" language referenced in its February 13, 2002 letter because he felt that characterizing his entire article as "significantly flawed" was unique to Walker's peer review (TR 470-71).

Although the Complainant strongly objects to the characterization of *Adverse Interactions* as "significantly flawed," in fact that was not an unreasonable characterization. While the exact description of *Adverse Interactions* as "significantly flawed" may have been unique to Walker, the fact remains that the article was severely criticized by virtually everyone who reviewed it. First, of course, was *Lancet*, which refused to publish it. Since the Complainant stated that he threw away the *Lancet* reviews, all we have to go by is his representation of what was said, but even he admits that one of the Lancet reviewers was "very negative" about the article (TR 543). Second, a completely independent (albeit unauthorized) reviewer – Millner – found "several fundamental and serious flaws" and noted that "the evidence and analysis do not support the conclusions" (RX 53, at 1, 3). Finally, all of the EPA reviewers had serious problems with the article (*see* RX 50, 51, 54).

On February 14, 2002, ERD cleared Complainant's revised *Lancet* article for publication (RX 83). The clearance form notes that the article "enunciates new policy or affects existing policy" and that NERL, RTP and ORD should be informed about it (RX 83).

On or about February 25, 2002, Complainant completed another article entitled *Risk from Pathogens in Land Applied Sewage Sludge* ("*ES & T* article")(RX 88). On February 26, 2002 Russo sent it to Morris along with an approved fact sheet and memorandum (TR 388-89, 893; RX 88, 90). This article was inconsistent with EPA policy at the time (TR 397).[35] Complainant intended to submit this article for publication to the *Environmental, Science & Technology Journal* ("ES & T")(RX 88, at 2; TR 894). He told his supervisors that he needed a finalized version because *ES & T* "was eager to publish the article" (TR 389).

On March 8, 2002, at the request of Mari Hollingsworth, a resident of Arcadia, Florida who was concerned about the land application of sludge, Complainant made a presentation in that town on his Rule 503 research (TR 407; RX 97).[36] Complainant stated that he believed Hollingsworth was part of an environmental organization and he was unaware whether this

[35] Smith read the *ES&T* article and found it "alarming" for raising concerns that were not adequately supported scientifically (TR 1248-49). Smith then testified that the article concludes that more research is needed (TR 1268-69).

[36]Hollingsworth believed that Complainant spoke at this meeting in his official role as an EPA scientist and cannot remember if he made a disclaimer (TR 591, 593).

organization was pro- or anti- Rule 503 (TR 408).[37] The purpose of this meeting was "[t]o inform the people in the county what sludge [was] and the dangers of sludge" (TR 587). Local government officials and local media were present at this meeting (TR 408). Following this meeting, Azurick Corporation, a sludge company in Florida, gave a copy of the meeting transcript to Synagro and Synagro contacted EPA with concerns regarding Complainant's presentation (TR 534). As a result of Synagro's contact, Morris raised an issue with Complainant regarding the sufficiency of an oral disclaimer that Complainant gave at the start of his presentation (TR 409-10). Complainant testified that he did issue a sufficient disclaimer (TR 410-11). At the beginning of his presentation he stated:

> And I'm here tonight to talk about the research I've done. I do want to make a distinction that within the Environmental Protection Agency there's a research organization called The Office of Research and Development; that's where I work and other scientists work who do research and publish it in science journals.
>
> It is not our office that makes policy for the agency. So I'm not here to talk about policy or to articulate EPA's policy on land application of sewage sludge. I'm just here to talk about my research, and I can share with you the results of that research.

(RX 97). Morris did not think this was an adequate disclaimer but stated that she had never told Complainant the appropriate language for an oral disclaimer (TR 1016, 1018). Complainant is unsure whether the court reporter transcribed his complete disclaimer (RX 106, at 4). He believes that he is the only scientist at EPA that has to give a disclaimer prior to making such oral presentations (TR 533). Complainant testified that it is not rare for an EPA scientist to make a presentation critical of EPA policy but admits he has never heard one, other than himself, make a presentation stating that an EPA "regulation is not protective of human health" (TR 573-74).[38] Russo agreed that no other scientist in her division, besides Complainant, stated that EPA regulations are not protective of the environment and human health (CX 1, at 159). Holm also testified that he is unaware of another EPA employee questioning EPA policy to the extent that Complainant has questioned it (TR 629). Morris testified that whether or not Complainant was speaking in his official capacity, if he talked about his opinion of policy he would need a disclaimer (TR 979, 1013, 1019). No disclaimer was necessary if Complainant talked solely about his research; but Morris believed that this presentation went beyond just talking about research (TR 1014-16; *see* CX 97, at 23, 28, 31).

Smith received a copy of WEF's letter, along with the revised fact sheet, because he is on WEF's list serve (TR 1245-46). On March 18, 2002, Smith emailed Holm to inquire whether ORD had cleared the revised fact sheet for dissemination at the NWC conference (TR 1247; RX 69). Smith was concerned because the revised fact sheet was disseminated on EPA letterhead, implying that EPA endorsed it (TR 1248). The information contained in the revised fact sheet

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[37] Of course, Complainant is well aware that a group that was in favor of the land application of sludge would never ask him to speak at such a meeting.

[38] Complainant has made statements saying that EPA regulations are not protective of human health (TR 574). He did not make disclaimers when he made these statements until Morris instructed him to (TR 574).

was contrary to EPA policy (TR 1248). On March 19, 2002, Russo informed Holm that she would "check on some facts" in response to Smith's inquiry and the WEF letter (JX 1, at 79-80; JX 1A, at R6).

On or about March 19, 2002, Morris received from Russo a copy of the WEF's February 13, 2002 letter (TR 895; RX 89). Up until this time, Morris had not yet pointed out any inaccuracies in Complainant's revised *Lancet* article's fact sheet because she believed she had 120 days from the date she received it before the article would be disseminated or completed to do so (TR 966-67). Morris took issue with the biographical information on the fact sheet because it did not reference Complainant's IPA (TR 969-70, 975). However, Complainant's fact sheet for *Adverse Interactions* did not contain this information and Morris never commented about it (TR 969-70; *see* RX 76). Further, in the revised *Lancet* article's fact sheet Complainant noted that research was done at NERL and ORD, while *Adverse Interactions*'s fact sheet makes no mention of these facilities (TR 1012-13; *compare* RX 76, at 4 *with* RX 87, at 2).

On March 28, 2002, the OIG issued a status report in response to an NWC allegation (CX 89; *see* CX 140, at 30). In this report, the OIG concluded that EPA placed the biosolids program in a low risk/low priority category (CX 89, at 4). OIG also concluded that EPA had no formal tracking system to monitor biosolids health risks and did not plan to "complete a comprehensive evaluation and monitoring study to address the risk assessment of uncertainties" (CX 89, at 5). OIG found that more research is needed in the area of pathogen testing and discussed ORD's concerns found in the preamble of Rule 503 (CX 89, at 5, 24). These were all allegations that NWC brought forward based on information provided by Complainant (TR 284-88).

During this time frame, Complainant increased his public appearances throughout the country to address these issues (TR 269). He distributed Russo's letter to UGA regarding the scope of his IPA to those involved with the sludge issue (TR 269-70).

On April 3, 2002, Morris emailed Russo regarding the disclaimers on Complainant's revised *Lancet* article and Complainant's *ES & T* article (RX 90). Morris agreed that both articles had policy implications (RX 90; TR 896). She informed Russo that NERL was reviewing the accompanying fact sheets and memorandum for each article (TR 897). Morris requested that Russo inform her of any publication deadlines because she did not want to hinder their publication (TR 897). No one at NERL told Russo to stop the publication of Complainant's articles or asked her to change the language of any of the contents of Complainant's articles, aside from the disclaimer and biographical information (JX 1, at 120-21; CX 1, at 164). Further, no one at EPA instructed Russo to cease allowing Complainant to participate in "outside activities" (JX 1, at 121-22).

On April 16, 2002, Complainant sent Vanderhoef a copy of the *ES & T* article (RX 191). Complainant testified that while Vanderhoef was not qualified to conduct a peer review of the article, he asked her to informally review it because he cited to OIG reports in the article and wanted to know if OIG wanted any changes in the article (TR 524-25; RX 191). Vanderhoef responded to Complainant on April 22, 2002 and provided comments on the portions of the article where Complainant cited to the OIG reports (RX 191). He made all of the changes that Vanderhoef requested (TR 525).

On April 22, 2002, Morris emailed Russo with concerns regarding the disclaimer on the *ES & T* article (RX 93; TR 389, 902-03). The original disclaimer read:

> The research described above was conducted in part under an Intergovernmental Personnel Act Assignment between the U.S. Environmental Protection Agency (Agency) and the University of Georgia. It has been subjected to Agency review and approved for publication. Mention of trade names or commercial products does not constitute an endorsement or recommendation for use.

(RX 93). Morris requested that Complainant change the disclaimer to read:

> The research described above was conducted in part under an Intergovernmental Personnel Act assignment between the U.S. Environmental Protection Agency (EPA or Agency) and the University of Georgia. Although this paper has been subjected to an Agency review process and approved for publication, it does not necessarily reflect the views of EPA and no official endorsement of the opinions expressed in the paper should be inferred. Mention of trade names or commercial products does not constitute an endorsement or recommendation for use.

(RX 93). Morris suggested this new disclaimer because it did not appear that Complainant had coordinated with OW about the *ES & T* article and she "wanted a disclaimer that reflected that" (TR 903). Complainant disagreed with the revised disclaimer because of the length (TR 390). Complainant also disagreed with the revised disclaimer because the "no official endorsement" language added was, in his opinion, "language that EPA ha[d] established for non-peer reviewed reports" (TR 390, 392-94). Holm testified that the "no official endorsement" language of this disclaimer seemed out of the ordinary for a peer reviewed article (TR 674-75, 715). Russo testified that it was unusual for Morris to change the disclaimer that Complainant obtained from the NERL Policy and Procedure Manual, that she had never seen the language that Morris incorporated and that ORD had never done this before (JX 1, at 87-90, 93-94, 98). Morris testified that she obtained the language for the new disclaimer from various disclaimers in the NERL Policy and Procedure Manual (TR 904). Complainant felt that this request was discriminatory because Complainant could not find another EPA scientist's peer reviewed article's disclaimer containing the same language and because it merged the disclaimer languages found in the NERL Policy and Procedure Manual (TR 391, 394). The NERL Policy and Procedures Manual has different disclaimers for different papers and the "no official endorsement" language is used when a paper is not adequately peer reviewed (TR 391, 395). Complainant testified that he does not believe that the statements in the article are false (TR 547-48); but, he does not believe that EPA endorses these statements and testified that it never requested that Complainant alter these statements (TR 398-99; *see* TR 626). Russo testified that she is not aware of another EPA scientist who was asked to alter disclaimers on multiple occasions (CX 1, at 95-96). Ultimately, Morris has the authority to require an altered disclaimer (TR 390; *see* TR 724-25). Furthermore, no one questioning the disclaimer proposed by Morris has alleged that it is inaccurate in any way. In effect, the Complainant is objecting to being required to tell the truth.

In this correspondence, Morris also suggested that Complainant change his biographical information (RX 93; TR 904). Morris testified that she thought the original biographical

information lacked clarity (TR 904). In composing new biographical information, Morris consulted Complainant's IPA agreement (TR 904-05).

On May 2, 2002, Complainant emailed Holm noting that despite his objections he would change the *ES & T* article's disclaimer to comply with Morris's instructions and suggested that they use the same disclaimer for the revised *Lancet* article (RX 96). However, Complainant pointed to 24 articles written by EPA scientists which were recently published in *ES & T,* none of which had a similar disclaimer (RX 96). Holm forwarded this email to Morris on May 3, 2002 (RX 96). Morris had not reviewed any of the articles that Complainant included in this survey because either the authors were not NERL employees or the articles were not flagged with policy implications for Morris's review (TR 906-15; *compare* RX 96 *with* RX 117-29). Holm was concerned about fostering open debate and treating all scientists equally (TR 677; TR 906). He believed that Morris's disclaimer indicated that EPA did not support the views and science presented in the *ES & T* article*,* minimized the science of the article, and noted that EPA scrutinized this article more than it has others (TR 678, 725).

On May 7, 2002, Morris emailed Russo requesting responses from Complainant regarding the dissemination of the fact sheet at the NWC conference, the lack of a disclaimer during his BU presentation and the adequacy of the disclaimer at his Arcadia, Florida presentation (RX 98; TR 916-18).

On May 22, 2002, Complainant emailed Russo noting the imminent deadline for the publication of the revised *Lancet* article and his uncertainty about the appropriate disclaimer language (RX 102). In this email, Complainant informed Morris that he needed to know about the disclaimer by 4:00 pm that day (RX 102). Russo forwarded this email to Morris (RX 102). That same day, Morris responded to Complainant's disclaimer question and provided a new disclaimer for the two articles which read:

> Some of the work referenced in this paper was conducted under an Intergovernmental Personnel Act assignment between the U.S. Environmental Protection Agency (EPA) and the University of Georgia. The views expressed in this paper are those of the authors and do not necessarily reflect the views or policies of the EPA

(RX 103). This disclaimer was shorter than Morris's earlier proposed disclaimer (TR 401-02, 919; RX 103). Morris did not allow Complainant to use his proposed disclaimer because it did not clarify his IPA work or state that it does not reflect the views of EPA (TR 919-20; RX 103). Holm believed that the last sentence in this new disclaimer was still inconsistent with disclaimers suggested for peer reviewed articles and was not present in any other peer reviewed article disclaimer that he had seen (TR 681-82). However, NERL policies allow for flexibility in using disclaimers (TR 920).

In the end, both the revised *Lancet* article and the *ES & T* article were published with disclaimers that Morris and Complainant agreed upon (TR 418).

On June 3, 2002, Complainant submitted to Russo a proposal to work on homeland security issues (CX 17; RX 140; TR 436; *see* CX 1, at 111-12). As a corollary to this request, Complainant noted that "EPA would have to drop its insistence that [Complainant] retire by May

28, 2003" for him to complete the project (RX 105, at 5; TR 437-38). Complainant requested a response to this request by June 14, 2002 (RX 105, at 5; TR 439). On June 4, 2002, Russo forwarded a memorandum from Complainant to Foley that included, among other things, Complainant's request to work on homeland security, which would modify his 1998 settlement agreement with EPA (RX 105, at 5; TR 440; *see* CX 1, at 114). Larry Cupitt, the Associate Director of Health in NERL and NERL's coordinator of the Homeland Security program, received Complainant's request (TR 684-85; *see* JX 1, at 139). Holm believed that Complainant "would bring innovative approaches to addressing the complex problems that are associated with [the Homeland Security] program" (TR 686).

Still on June 4, 2002, Russo and Complainant responded to Morris's May 7, 2002 questions regarding the dissemination of the revised fact sheet, the BU abstract/presentation disclaimer issue and the Arcadia, Florida disclaimer issue (RX 106; TR 411, 920-21). Regarding the dissemination of the revised fact sheet, Russo denied having knowledge of what transpired at the conference but acknowledged that "there is no requirement for official clearance of [fact sheets], nor is there a requirement for a disclaimer" (RX 106, at 2). Regarding the BU abstract disclaimer, Russo explained that it did not require disclaimers on abstracts and noted that a survey of EPA authored abstracts revealed that most did not have disclaimers (RX 106, at 3; CX 1, at 102-03; CX 16). Holm testified that Morris would not normally handle abstracts (TR 734). Regarding the Arcadia, Florida disclaimer issue, Russo denied having any "knowledge about the oral disclaimer Dr. Lewis provided during his talk" (RX 106, at 3-4).

Complainant initially believed he never received a response to his request to work on homeland security issues (TR 439). While unaware if EPA has responded to others' requests to work on homeland security, Complainant is aware that some of the other scientists who requested to work on homeland security issues are now working in that area (TR 436). Complainant believes EPA's failure to respond to his request was discriminatory because Russo told him that he is the only employee under her supervision who does not receive responses to requests (TR 435-36). However, on June 24, 2002, Morris emailed Russo to, among other things, respond to Complainant's "recent requests . . . to modify, expand, and/or terminate the research he is currently doing" (RX 109). Morris informed Russo that "EPA will not agree to any deviation from or modification of" the 1998 settlement agreement (RX 109; *see* TR 924-25). This was Morris's response to Complainant's request to work on homeland security and perchlorate issues (TR 924-25). Complainant testified that he "can see where [Morris] would consider this to be a response to [his] [homeland security] request" (TR 440-41).

On June 27, 2002, Morris emailed Russo noting that she "will issue a response to the letter [EPA] received from Synagro regarding [Complainant's] research activities" and informed Russo that NERL will fax her its response to WEF's February 13, 2002 inquiry (RX 110; TR 922). At this time, the February 6, 2002 letter was the only unanswered letter from Synagro (TR 271; *see* CX 12).[39] Respondent stipulated that Complainant's "assignment to UGA under the IPA was proper" (JS 31) and that "Synagro's specific concern that Dr. Lewis had violated the terms of his IPA was without merit" (JS 10). Respondent also stipulated that Synagro's allegation that Complainant used his IPA to support his "private, paid expert witness work and

[39] Complainant testified that Synagro had withdrawn the other correspondence regarding himself (CX 272).

his personal antibiosolids work" was not EPA's view (JS 17). Respondent further stipulated that Synagro's allegation that Complainant received payment for his expert witness work was without merit (JS 20) and that his work "did not violate any applicable policies" (JS 32). These stipulations would have fulfilled some of Synagro's February 6, 2002 inquiries (TR 273-77). Despite Morris assertion in her June 27, 2002 email, as of the date of the hearing EPA had not yet responded to Synagro's letter (TR 277).

Morris also commented in this June 24, 2002 email regarding the dissemination of the revised fact sheet, Complainant's lack of disclaimer on the summary posted on BU's website, and Complainant's disclaimer in Arcadia, Florida (RX 110; TR 921-22). With regard to the fact sheet, Morris recognized that "facts sheet do not normally require disclaimers" (RX 110). But the fact sheet that Complainant disseminated was not typical. It was on EPA letterhead and it was released before it was approved and, therefore, should have had a written disclaimer (*see* RX 110). With regard to the abstract posted on BU's website, Morris found that because Complainant's summary "d[id] not reflect official Agency policy" and was "publicly posted" a disclaimer is appropriate (RX 110). Morris asked Russo to have Complainant contact BU and "request to amend this posting by including an appropriate disclaimer or notice" (RX 110). Morris also found that Complainant's disclaimer in the Arcadia, Florida transcript was insufficient but "accept[ed] the possibility that [Complainant] issued a disclaimer during his Arcadia presentation not recorded in the transcript" (RX 110, at 2).

Simultaneous with this email, Morris, on behalf of Foley, responded to WEF's February 13, 2002 letter (RX 111; TR 922). Morris sent a copy of this letter to Russo (TR 922). Complainant is aware that employee privacy laws prevent EPA from discussing allegations of Complainant's wrongdoing with, and from dissemination of personal information about Complainant to third parties, including WEF (TR 416; *see* RX 111). In this letter, Foley explains these employment law restrictions and EPA's inability to answer WEF's inquiries about Complainant (RX 111). Further, he states that "[t]he Agency wants to make it absolutely clear . . . that its inability to discuss these matters in no way should be interpreted as corroboration of your allegations regarding Dr. Lewis" (RX 111). Complainant never waived his rights under these employment law statutes; however, Complainant understands that he could have waived these rights (TR 418, 534-35). Complainant did not believe that the Privacy Act would prevent EPA from responding to WEF's or Synagro's letters and no one from EPA confronted him about waiving his rights (TR 534-35). Had EPA requested a waiver, Complainant would have granted it (TR 535). Complainant believes that the letter should have clarified that there was not an agreed-upon system for clearance of fact sheets in ORD and that Complainant did not violate an internal policy (TR 415). Holm did not believe that the Athens Laboratory was asked to contribute to this response letter (TR 708-09).

On October 31, 2002, AA Gilman wrote a letter to Robert Varney, Regional Administrator for EPA Region I, stating that EPA agreed with the NAS study and conclusions (RX 189). Gilman further stated that EPA is "committed to conduct additional research on [the biosolids program]" (RX 189). Because some of the NAS study results and recommendations originated with Complainant, Complainant believed that he has effectuated a change at EPA regarding its policy on sludge (TR 296-97). Complainant testified that EPA has not acknowledged any contributions that he has made to Rule 503 (TR 283). Complainant seriously believes that EPA should have acknowledged his research with a gold medal (TR 283-84).

Harrison testified that EPA's stance on the science behind Rule 503 has changed from EPA thinking a few years ago that the science behind Rule 503 was complete, whereas, now EPA represents that some research is necessary (CX 140, at 45; *compare* CX 127 *with* RX 189).

On December 3, 2002, Complainant wrote Hollibaugh and Hodson and informed them that EPA is not going to respond to UGA's inquiries about the scope of Complainant's IPA (CX 105). In an attempt at further clarification, Complainant attached Guerrero's deposition regarding the scope of his IPA to a letter to Hollibaugh and requested that he forward it to Leed, UGA's counsel (CX 105; TR 559). Complainant believes that this information was forwarded to Leed, the Dean of Arts and Sciences at UGA and other UGA officials. Complainant believed that a formal letter from EPA would be more persuasive (TR 560).

To aid in funding his IPA research, Complainant stated that he raised approximately $500,000 from private funds and contributed $80,000 of his own money (CX 155). Following the completion of his IPA, on December 17, 2002, he sought to continue his research in Egypt (CX 155). He sought $150,000 from EPA to fund this project through May, 2003 (CX 155; *see* JX 1, at 133-35). This amount was reasonable, and Stancil, Holm and Russo all signed off on it (CX 155; TR 692). Following ERD's approval, Complainant's request went to Rochelle Araujo, the Acting Associate Director for Ecology, as did all of the other projects that requested resources (TR 728; see CX 155; JX 1, at 134-35). Since the time of this request, ORD has suffered major resource cuts (TR 729). At the time of the hearing, EPA had not provided the requested funding to Complainant (TR 693; *see* JX 1, at 134-35).

On January 12, 2003, Complainant emailed a manuscript prepared for publication in *Environmental Health Perspectives* to Smith for "informal" review (TR 1249; RX 115). Smith involved three other individuals, after obtaining Complainant's clearance (TR 1249). On March 1, 2003, Smith emailed his review of this manuscript to Complainant (TR 1251-52; RX 226). In this review, Smith noted that Complainant needed to place some statements in perspective and that some of his statements are exaggerations (TR 1252-53; RX 226, at 3, 5). Brobst, another reviewer of this article, concluded that "[t]his paper should only be submitted for publication after major revisions are made" (RX 227, at 2; TR 1254, 1259). Both of these reviews were sent to OGC without Complainant's knowledge or consent (RX 226-27; TR 1259-60). Smith sent a copy to OGC because he "was aware that [he] was going to be called to a hearing like this, and that it was going to concern Dr. Lewis, and [he] thought it was important for [OGC and him] to be in sync;" however, OGC was not substantively involved with either review (TR 1260, 1296-97).

On April 2, 2003, EPA's response to the NAS study was published in the *Federal Register* (CX 157). Complainant never saw the final version of EPA's response to the NAS study prior to its publication (TR 1306). EPA's response suggests coordinating with the CDC for tracking biosolids related illnesses, implementing "[m]olecular tracking studies," studying analytical methods for selecting pathogens in pollutants, sampling biosolids for the presence of pathogens, examining biosolid air particles for pathogens, examining the disinfection processes of biosolids and monitoring biosolids for staphylococcus aureus (CX 157, at 23-24, 27, 30-31, 47-48; TR 1306-19). These recommendations were similar to Complainant's recommendations in his *ES & T* article and the revised *Lancet* article and fact sheets, and at the 1998 AAAS meeting (CX 91, at 3, 5-7; TR 1306-19). Holm testified that this published response "appears"

consistent with Complainant's research; but he does not know if Complainant was the first person, or the only person, at EPA with these ideas (TR 743, 745). Complainant testified that he knows that he is the first person at EPA with these ideas because he was the first to publish these ideas (TR 1325-26). He believes he was the first person in EPA to initiate dialogue with the CDC regarding collaboration to track illnesses related to biosolids (TR 1320). Harrison testified that "without David's involvement [in Rule 503] we wouldn't be at all where we are today in terms of looking at the issues of safety" (CX 140, at 77). There is no citation to Complainant in this published response (*see* CX 157; TR 743, 1320). The response does have references to Walker's work (TR 1320-21; CX 157, at 42). Complainant believes that EPA's failure to cite his contribution to this response has negatively affected his reputation because a scientist's reputation hinges upon whether "his or her ideas and contributions [has] formed a basis for other scientists to build upon" (TR 1321-23). Merely representing that he initiated all of this research, without the appropriate citation in the response, would not "carry any weight" in a job interview (TR 1323). Complainant further testified that potential employers look at what scientists have accomplished in the past 2-3 years, not the past 5-10 years (TR 1324).

At the time of the hearing, EPA was researching "exposures around land application sites" through a grant that was given to the USDA in or around the year 2000. Additionally, EPA is currently researching the exposure, characterization, and, to a limited degree, the health effects aspect of Complainant's research (TR 1106-07). At the time of the hearing, EPA was not conducting an epidemiological study (TR 1107). There was no discussion of bringing Complainant in on this research (TR 1107). Walker speculated that "it wasn't discussed in part because Dr. Lewis is not a part of the Department of Agriculture, . . . where the grant was," or OW (TR 1107). Walker believed that Complainant "could be useful" to this research but he "think[s] it would be difficult in terms of a give and take research kind of environment, . . . it would have some inhibiting impact on your ability to do research if you were likely going to be involved in lawsuits" (TR 1112). He stated that he would have difficulty working with Complainant because Complainant believes that Walker is trying to suppress him (TR 857, 1108-09). Walker estimated that ORD has contributed $75,000 towards these research projects (TR 1107-08). Mintz, NERL's ALD, has contacted Complainant with regard to documents for follow up biosolids research (TR 687). Complainant's current role in biosolids research was scheduled to end in May, 2003 (TR 689).

During the timeframe pertinent to this case, Complainant maintained a website that aggressively campaigned against the land application of biosolids (*see, e.g.,* RX 34, 166). Complainant also discussed details of his, and others', whistleblower actions against EPA on this website (*see, e.g.,* RX 34).

## G. EPA Funded Organizations

### *Water Environment Federation*

WEF is "an association of waste water professionals" (TR 821; CX 49, at 138). WEF and EPA have worked hand in hand on many projects. EPA helps to fund, and gives grants to, WEF (TR 144-45; CX 140, at 12-13; *see generally* CX 129). Beginning in 1992, part of EPA's funding to WEF was for WEF's aid in "promot[ing the] beneficial use of biosolids" (CX 129, at 5-18, 60, 77; TR 146, 822-23, 833-34, 1085). Between 1992 and 1997, EPA gave WEF

$515,000 for this purpose (TR 842-43; CX 129, at 100). Walker has served on a number of WEF committees and is an EPA project officer for funding WEF (TR 236, 825; CX 129, at 64). As project manager, Walker was responsible for expanding the public's acceptance of the biosolids program based on sound information (TR 825-26). O'Dette has also been a member of committees within WEF (TR 144, 822).

A cooperative agreement is a grant from EPA where EPA and the grantee work together (TR 823). The National Biosolids Public Acceptance Campaign is a cooperative agreement between EPA and WEF where WEF agrees to publicly promote the safety of the land application of biosolids (TR 237; *see* TR 830-32). The National Biosolids Public Acceptance Campaign also mandated that WEF evaluate claims of illness due to biosolids (TR 838; CX 129, at 61). WEF and EPA have worked together to compile a fact sheet on biosolids, and WEF has paid for EPA employees to travel to give lectures or speeches (CX 49, at 158-60). In 1995, Rubin was on an IPA at WEF and EPA and WEF jointly paid his salary (CX 52, at 178). Since WEF and EPA's policies on sludge were consistent, Rubin's IPA responsibilities were similar to his EPA responsibilities (CX 52, at 179).

Subsequent to filing the instant two complaints, Complainant filed a complaint with OSHA against WEF alleging that EPA and WEF were working together against Complainant (*see* TR 472-73). Complainant believed that part of this collaboration included WEF obtaining Walker's peer review from EPA and mentioning its "significantly flawed" language (TR 472-73).

During the timeframe that encompassed the instant case, OIG investigated the relationship between EPA and WEF, including EPA's grants to WEF, and did not find any impropriety (TR 483; CX 89, at 5). Despite failing to answer some of NWC's concerns in this investigation, Complainant wrote the OIG congratulating it on the quality of this report (TR 485-86).

*The New England Biosolids and Residuals Association*

The New England Biosolids and Residuals Association ("NEBRA") is an organization that advocates the land application of sludge and "provides technical information about biosolids recycling" to the public (TR 595, 788, 846-48, 1280; CX 49, at 142; *see* CX 97). In 1998, NEBRA requested funding from EPA because "New England . . . has become a hotspot for skepticism about biosolids recycling" (CX 137, at 1-2; *see also* CX 137, at 5). Walker recommended, and EPA provided, NEBRA with grant money to support NEBRA's website and the promotion of beneficial biosolids application (CX 97, 137; RX 187; TR 788, 849, 855-56, 1102). Caroline Snyder, a Professor Emeritus at the Rochester Institute of Technology, monitors NEBRA's website frequently and has seen derogatory remarks questioning Complainant's credentials and commenting on his expert witness work in the *Marshall* case on this website (TR 594, 596). Snyder has not seen reference to any other specific person on NEBRA's website (TR 596-97). Snyder testified that these remarks about Complainant were very damaging to his reputation because EPA sponsored the website and the Complainant was an EPA employee (TR 598); she also testified that there was a public perception in New Hampshire that EPA and NEBRA were working together against Complainant (TR 600, 604). Although very pro-biosolids, NEBRA's April 5, 2002 website presented both pro- and anti- Rule 503 information (TR 606-07; RX 184). Although NEBRA's website had a link to the "White Paper," it also had a link to Complainant's website (TR 597, 608; RX 184, at 4-5). Snyder testified that New

Hampshire state officials used NEBRA's website as their main source of information regarding land application of sludge (TR 597).

EPA requires that the recipient of a grant for a website maintain a disclaimer on that website, stating that the recipient, not EPA, maintains that website (TR 788; RX 185). Walker is the project manager for the NEBRA grant and it was his responsibility to monitor NEBRA's activities (CX 137, at 26; TR 849, 1102; *see* TR 798; CX 151, at 2). Walker admitted that he "generally d[id] not look at [NEBRA's] website" (TR 798). He recently learned that NEBRA did not have the appropriate disclaimer on its website (TR 788; *see* CX 97, RX 187). As a result, he requested that NEBRA add a disclaimer stating that "NEBRA owns, operates, and maintains this website and is solely responsible for its content," and NEBRA complied (CX 97; RX 186-87; TR 788-90; *see* CX 137).

Further, in 1998-99, NEBRA issued a survey report recommending that "[a]ny public information campaign should emphasize agronomic benefits, recycling, and safety, and focus attention on the strong scientific basis for current regulations and policies recommending land application" of biosolids (CX 137, at 95). The survey report laid the framework for NEBRA to follow when advocating biosolids (TR 1094). The survey did not have a disclaimer and Walker testified that it should have had one and that he did not realize that the disclaimer was absent (TR 1102-03).

### H. Requested Relief

Complainant testified that all of these incidents have affected his reputation in the scientific community (TR 302; 504-05). At EPA a GS-14 research scientist must have a good national reputation while a GS-15 research scientist must have a good international reputation (TR 303, 646; *see* CX 45, at 111-12). Complainant testified that his reputation has been tainted because of the distribution of the "White Paper" and NAS discussions of his research in light of the "White Paper" (TR 304). Snyder testified hyperbolically that a scientist's career is over if that scientist's credentials are challenged (TR 594, 600). But obviously a scientist's reputation is a critical factor for career advancement (CX 43, at 28; CX 22, at 2; *see* CX 140, at 65).

Between March 27, 2002 and February 13, 2003, Complainant and his research were the subjects of various media outlets and government inquiries, including *Boston Globe*, *ABC's Good Morning America*, *USA Today, Environmental Science & Technology Journal, UGA News Release, U.S. News & World Report, CBS, NBC, CBS 60 Minutes, Insight Magazine, Scientific American, Red & Black (UGA newspaper), Sarasota Herald Tribune, The Wall Street Journal, CNN, L.A. Times,* Senator Inhofe's committee, Congressional Updates, Texas Judges, Texas State Representatives, Texas & Virginia County Commissioners and the Chinese Government (RX 202-16; TR 507-17). Complainant testified, apparently seriously, that this type of press coverage does not bolster his reputation in the job market because potential employers do not request newspaper articles from job applicants (TR 571).

Complainant and EPA agreed in the 1998 settlement agreement that Complainant would retire on May 28, 2003 or EPA may terminate him on that date (TR 490). Complainant often

refers to this as an "involuntary" retirement (TR 511).[40] Complainant's decision to retire was made public in a press conference in January, 1999 (*see* RX 26; TR 494-95). Complainant testified that he does not intend to retire on that date (TR 493).[41] Although he is not asking directly to modify this 1998 settlement agreement (TR 490-91, 567-68), he is asking to be instated in a homeland security position at EPA.

Dr. Hodson, Director of UGA's School of Marine Programs from 1996-2001, testified through a video deposition (CX 24, at 5-6). He has known Complainant for approximately 20 years (CX 24, at 6). When Complainant commenced his IPA, Hodson talked to Complainant about a possible professorship following his tenure at EPA (CX 24, at 21-23). This topic also was broached at UGA faculty meetings, with members of UGA's administration and Department of Marine Sciences, and with Professor Tim Hollibaugh (CX 24, at 22-23). Hodson testified that prior to Complainant's IPA, Hollibaugh supported hiring Complainant 100% as a professor if UGA could generate the funds (CX 24, at 40).The salary for a UGA professor was $140,000 to $160,000 annually (CX 24, at 34-35). However, during Complainant's IPA, Synagro initiated an FOIA request for documents concerning Complainant and deposed UGA faculty members, in an effort to determine the scope of Complainant's IPA (CX 24, at 24-25). UGA inquired about the scope of Complainant's IPA to EPA, reluctant to only rely upon the Athen's EPA laboratory's representation (*see* CX 24, at 27-29). At a UGA meeting people questioned Complainant's biosolids research and his IPA (CX 29, at 15-16). Following these inquiries, UGA's grants and funding office, legal office, research office and provost office all expressed to Hodson concerns about hiring Complainant (CX 24, at 29-30, 32-34). These concerns arose out of fear of lack of funding from regulated industries, as well as the EPA (CX 24, at 29-30, 32-34; TR 255-56). Colleagues and faculty members at UGA became aware that a peer review found his research "significantly flawed" (TR 240). The UGA College of Agriculture faculty members expressed that they believed that EPA did not support Complainant's IPA research (CX 24, at 46). Following all that has happened, UGA no longer discusses future employment with Complainant (TR 281). Complainant believes his future employment prospects at UGA would greatly improve if EPA responded to Synagro's scope of IPA inquiries (TR 556, 558). However, even if EPA clarified the scope of Complainant's IPA, Hodson believes that UGA would have to weigh the benefit of Complainant's scientific contribution to UGA against the risk of losing funding from EPA and regulated industries (CX 24, at 32).

However, Complainant believed that his ability to obtain a job in the future with UGA was damaged prior to Synagro's July, 2001 letter to EPA (TR 467). On June 4, 2001, during a deposition for the *Marshall* case, Complainant stated that the *Marshall* case had affected his

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[40] Complainant's unfavorable feelings about his settlement agreement predate any of Synagro's letters to EPA, the distribution of the "White Paper," or Walker's contacts with O'Dette (TR 498-99, 504).

[41] Complainant testified that it is his impression that his December 1, 1998 IPA was renewed for two years, and because he is required to work for the government for a period equal to his IPA (RX 31, at 7; *see* CX 10; *see also* CX 1, at 107-08), he believes he is not eligible for retirement until December 1, 2006 (TR 564-66). This contention is specious.

future position at UGA because of "the way the discovery process was handled by opposing counsel" (RX 41, Transcript at 73). Complainant testified at the deposition that:

> My efforts to get Mr. Leed to take the time to go through the documentation relevant to all of these issues and make a correct determination on that generated such hard feelings between the Department Chairman, Dr. Hodson, and his replacement when Dr. Hodson retired, Dr. Holm,[42] and the people on north campus, Mr. Leed and others. . . . It has created such an atmosphere of ill will that I was recently asked by Dr. Hodson about applying for a permanent university position there, with working that out. I told him my feeling was that it was such a bad atmosphere now with all of this, that I was not going to pursue employment at the University of Georgia as we had originally discussed

(RX 41, at Transcript at 74). At the time of the hearing, Complainant had not formally sought employment at UGA (TR 469). Also, he had not applied for any other type of employment to follow his pending May 28, 2003 retirement from EPA and did not anticipate finding employment prior to this retirement date (TR 282-83, 572). Complainant testified that to obtain comparable employment upon retirement he needs a good international reputation (TR 305).

At the time of the hearing Complainant had been retained as an "expert witness in a case involving cattle and salmonella poisoning" (TR 505). Francis Edwin Hallman, an environmental law attorney from Georgia, has talked with Complainant about being a witness in two upcoming cases where Hallman represents dairy farms in biosolids cases (TR 1029-32; 1052-53). At the time of the hearing, Hallman had not yet decided whether he would hire Complainant for this role because Complainant informed him about the Synagro Letter, "White Paper," WEF letter, EPA's lack of response and other documents that attack his credibility (TR 1053, 1070). Complainant told Hallman that EPA had responded to the WEF letter, but Hallman did not believe that EPA responded to the most incriminating part of the letter, the discussion of a peer review that found Complainant's research "significantly flawed" (TR 1070, 1072). Hallman believes the WEF and Synagro letters "significantly compromises [his] ability to use [Complainant] unless there are other documents that . . . would refute it" (TR 1055). The fact that EPA has not responded to Synagro's February 6, 2002 letter is a problem because some Georgia case law points to the argument that leaving a letter unanswered essentially means the recipient concurs with the letter (TR 1056-57, 1059, 1070-72). Absent these letters, Hallman believes the demand for Complainant's expert services would be high (TR 1060-62). Hallman testified that based upon Complainant's experience and educational background he would likely receive between $200 and $400 an hour for his expert witness services (TR 1063). These documents also affect Hallman's ability to refer Complainant's expert witness services to other attorneys (TR 1063).

Complainant believed that the reason that no EPA scientist had "blown the whistle" on the concerns regarding Rule 503 was because there was an "atmosphere of fear" at EPA (TR 101-08). However, Complainant said he was not fearful and became involved in researching the science behind Rule 503 because he had recently passed an OIG audit, was in the national media

[42] It is assumed that this Dr. Holm is a different person than the Dr. Holm who testified in this hearing, because the Dr. Holm who testified was working as Research Director in ERD at the time of this hearing (*see* TR 618).

spotlight because of his past work with dental instrument disinfection and had interactions with members of Congress (TR 106-08). He testified that he risked his career because it "would have a significant impact on public health and environment" and because he was the only person in the position to do it (TR 109). Complainant testified that other scientists at EPA are aware of what happened in the instant case and have told him "that they will not seek out [research] contrary to EPA's policies after seeing what happened to [him]" (TR 301). Harrison testified that she is unaware of any other EPA scientists publicly discussing the shortcomings of Rule 503 (CX 140, at 70-71).

Holm testified that EPA has treated Complainant differently than other EPA employees with regard to disclaimers (TR 648). He also testified that he believed that EPA was using a vast amount of resources to limit debate within EPA regarding biosolids regulations (TR 654, 655). Russo cannot recall another ERD employee subject to attack as much as Complainant was from Synagro (JX 1, at 70-75); and while she recalls other scientists in ERD attracting media attention through their research, she admits that Complainant has received more media attention in the past three or four years than other ORD scientists (CX 1, at 153-54; JX 1, at 70-75).

Complainant seeks the following relief: EPA should clarify with WEF and Synagro that there was no legitimate peer review that found Complainant's research "significantly flawed" (TR 239); EPA should contact everyone attending the Dawson and Franklin County hearings to inform them that EPA does not approve of or endorse the "White Paper" (TR 259; *Complainant's Conclusions of Law*, at 119); EPA should undertake a massive effort, whether by internet posting or mass mailing, stating that Complainant was permitted to research biosolids at UGA on his IPA, including a letter to Boyd at his OSHA office (TR 268); EPA should respond to Synagro's Feburary 6, 2002 letter, copy WEF, ORD, UGA and NAS, and publicly post it (TR 278; *Complainant's Conclusions of Law*, at 119); EPA should respond to UGA's inquiry regarding Synagro's allegations, and any other person who knew of these allegations, with an agreed upon correspondence (TR 280; *Complainant's Conclusions of Law*, at 120); Complainant should receive a gold medal, or equal commendation, for his contributions to Rule 503 (TR 284; *Complainant's Conclusions of Law*, at 120, 121); EPA should develop a policy, with a penalty for violation, prohibiting employees from issuing threatening or false or misleading letters within, or outside, EPA (TR 300); EPA should seal the Walker peer review documents and remove them from the *Lancet* peer review record (*Complainant's Conclusions of Law*, at 119-20); EPA should develop a policy "foster[ing] an open environment for scientific debate" and train employees in this policy (TR 301-02); reinstatement as a GS-15 scientist at US EPA's Athens Laboratory for a minimum of two years, during which EPA should equally consider him for participation in sludge projects he is qualified to work on and should prevent its contractors, such as NEBRA and WED, from discriminating against him (*Complainant's Conclusions of Law,* at 94-98); compensatory damages, for humiliation, loss of professional reputation, preparation of rebuttal to the "White Paper" and emotional distress; exemplary damages; attorney's fees; interest, as is permitted, for any monetary damages (*Complainant's Conclusions of Law*, at 98-113, 119, 121); and affirmative relief, including EPA-wide posting of this decision and EPA-wide whistleblower training (*Complainant's Conclusions of Law,* at 117-19).

## ISSUES

At issue in the instant case is (1) whether the Complainant filed a timely complaint of unlawful discrimination; (2) whether Complainant's complaint is covered by the provisions of CAA, SWDA, SDWA, FWPCA, CERCLA or TSCA[43]; and (3) whether EPA took adverse employment action or perpetuated a hostile work environment against Complainant because he engaged in an activity protected under the designated whistleblower statutes**.**

## DISCUSSION

### *Application of Statutes*

Respondent stipulated that the CAA covers Complainant's complaints (Respondent's Post Hearing Brief, at 54). Given the outcome of the case and the already great length of this decision, I will assume that all of the statutes are applicable to the instant case.

### *Timeliness*

In order to effectuate a timely filing of an environmental whistleblower complaint, the complainant must file the complaint "within 30 days after the occurrence of the alleged violation" (29 C.F.R. §24.3(b); 42 U.S.C. §6971(b); 15 U.S.C. § 2622 (b)(1); 42 U.S.C. § 7622(b)(1); 42 U.S.C. § 300j-9(i)(2)(A); 42 U.S.C. §9610(b); 33 U.S.C §1367(b)). However, a complainant may invoke an equitable exception to this limitations period "for continuing violations '[w]here the unlawful employment practice manifests itself over time, rather than as series of discrete acts'" (*McCuistion v. Tenn. Valley Auth.*, 89-ERA-6, at 8 (Sec'y Nov. 13 1991)(quoting *Waltman v. Intern. Paper Co.,* 875 F. 2d 468, 474 (5th Cir. 1989))(internal quotation marks and footnote omitted)). Courts consider three factors when determining whether an employer's actions constitute a continuing violation, which include:

> (1)Subject Matter, Do the acts "involve the same type of discrimination, tending to connect them in a continuing violation?" . . .
> (2)Frequency. Are the acts "recurring . . . or more in the nature of an isolated work assignment or employment decision?" . . .
> [and] (3)Degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?

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[43] The pleadings are inconsistent regarding whether the instant case was brought pursuant to the TSCA in addition to the five other environmental statutes (*compare Complainant's Conclusions of Law*, at 1, n.1 (mentioning the TSCA) *with Complainant's Pre-Hearing Statement*, at 1 (failing to mention the TSCA); *Respondent's Post-Hearing Brief,* at 54 (failing to mention the TSCA); TR, at 21-22 (failing to mention the TSCA)). In light of the decision in this case, it is irrelevant whether Complainant brought this case pursuant to the TSCA.

(*McCuistion, supra*, at 9-11 (citation omitted)). To be timely, at least a portion of the acts constituting the continuing violation must extend into the 30 day limitations period (*McCuistion*, *supra*, at 8-9 (citations omitted)). If an action is not deemed part of a continuing violation it still may, within an ALJ's discretion, "constitute relevant background evidence" of present hostility (*McCuistion*, *supra*, at 10-11 (citations omitted)).

Complainant filed the instant complaints on October 15, 2001 and September 23, 2002. The former complaint was filed within 30 days of Walker's distribution of the White Paper, which occurred on September 24, 2001 (*see* CX 96, at 3; TR 1184, 1194). While not filed within 30 days of Walker's flawed peer review, I find that both actions are similarly related and indicated a pattern of Walker's activity. Therefore, I find that the portion of Complainant's October 15, 2001 complainant addressing Walker's behavior is timely. The September 23, 2002 complaint was filed within 30 days of Complainant's receipt of discovery documents, including an OGC December 18, 2001 letter (*see* CX 14; RX 14). In this letter OGC answered questioned posed by OSHA; this letter included a discussion of the scope of Complainant's IPA, OGC's relationship to Synagro, correspondence from EPA to Synagro, Walker's activities related to Complainant, EPA's disciplinary actions towards Walker, and EPA policy with regard to peer reviews and the dissemination of information about other EPA employees (RX 14, at 13-19). Complainant, and Russo, believed that some of these representations were false (RX 14, at 2; CX 1, at 82-86). While the OGC letter, and circumstances addressed in the letter, occurred more than 30 days before September 23, 2002, I find, for several reasons, that the letter itself evidences a pattern of continuing violations and was timely filed. This latter complaint chronicles a pattern of alleged EPA contacts with Synagro involving references to Complainant. Further, the OGC letter serves as a permanent record of such contacts and EPA's other alleged adverse actions towards Complainant. While the OGC letter was written on December 18, 2001, I assume, especially in the absence of any contrary evidence in the record, that the August 29, 2002 discovery request was the first time Complainant saw this letter. As such, I find that Complainant's September 23, 2002 complaint was timely filed.

***Merits of the 2001/2002 Allegations***

Under the Clean Air Act:

> [n]o person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter

(33 U.S.C. § 1367(a)). The other environmental statutes under which Complainant has filed this claim have similar employee protection provisions (42 U.S.C. § 6971 (a); 15 U.S.C. § 2622 (a); 42 U.S.C. § 7622(a); 42 U.S.C. § 300j-9(i)(1); 42 U.S.C. §9610(a)).

To prevail under the environmental whistleblower statutes, a complainant must establish that: (1) the complainant engaged in protected activity, (2) the employer knew of the

complainant's protected activity, (3) an adverse employment action was taken, and (4) the adverse employment action was motivated, in whole or in part, by the complainant's protected activity (*see Dartey v. Zack*, 82-ERA-2 (1983); *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984)). If a complainant is successful in proving these points, the burden then shifts to the respondent to produce evidence that the adverse action was motivated by a legitimate, non-discriminatory reason (*see Guttman v. Passaic Valley Sewerage Comm'rs v. DOL*, 992 F.2d 474 (3d Cir.), *cert. denied,* 510 U.S. 964 (1993)). If the respondent can make this showing, the complainant then must prove that the respondent's asserted reason for taking the adverse action is not the true reason, but rather is a pretext for retaliation (*St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993)).

For purposes of this decision, it will be assumed that the Complainant's activities were protected under one or more of the environmental whistleblower statutes and that EPA was aware of his activities. Therefore, this decision will only discuss whether EPA took adverse actions against the Complainant, and if EPA took adverse actions, whether EPA took such actions in retaliation for the Complainant having engaged in protected activity.

*Adverse Employment Action*

"Because 'adverse actions can come in many shapes and sizes,'. . . it is important to consider the particular factual details of each situation when analyzing whether an adverse action is material" (*Shelton v. Oak Ridge Nat'l Lab.,* 95-CAA-19, at 7 (Sec'y Mar. 30, 2001)(quoting *Knox v. State of Indiana*, (93 F.3d 1327, 1334 (7th Cir. 1996)(citing *Bryson v. Chicago State Univ.*, 96 F.3d 912, 916 (7th Cir. 1996)(internal quotation marks omitted)). To qualify as an adverse action under the environmental whistleblower statutes an action must have a "tangible job consequence," such as dismissal, demotion, or involuntary transfer to a less desirable position (*Shelton,* 95-CAA-19, at 6-8 (citing *Oest v. Ill. Dep't of Corrections*, 2001 WL 12111, at *7 (7th Cir. 2001); *Davis v. Town of Lake Park*, 2001 WL 289882 (11th Cir. 2001); *see Mandreger v. Detriot Edison Co.,* 88-ERA-17 (Sec'y Mar. 30, 1994); *Nichols v. Bechtel Constructors, Inc.*, 87-ERA-44 (Sec'y, Oct. 26, 1992); *English v. GE*, 85-ERA-2 (Sec'y Feb. 13, 1992)). Because criticism and reprimands are a common feature of a work environment, they are not considered adverse actions absent evidence of a tangible job consequence (*Shelton, supra*, at 8).

An employer is responsible only under limited circumstances for adverse actions created by a complainant's co-workers (*Williams v. Mason & Hanger Corp.,* 97-ERA-14, 18-22, at 47-48 (A.R.B. Nov. 13, 2002)(citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 799 (1998); *see Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1270 (10th Cir. 1998); *see also Varnadore v. Oak Ridge Nat'l Lab.*, 99-CAA-2,-5, 93-CAA-1, 94-CAA-2,-3, 95-ERA-1 (A.R.B. June 14, 1996), slip op. at 77-78)). In this situation, liability attaches to the employer "if the employer knew, or in the exercise of reasonable care should have known, of the harassment [by the co-worker] and failed to take prompt remedial action" (*Williams, supra,* at 47-48 (citation omitted)). An employer has "constructive notice" of a co-worker's adverse harassing actions "if the harassment [is] so severe and pervasive that management should have known about it" (*Williams, supra*, at 48 (citing *Miller*, *supra*, at 1278-79)). "To avoid liability [for a co-worker's harassing behavior] an employer must take both preventive and remedial measures to address workplace harassment" (*Williams, supra,* at 48 (citing *Wilson*, *supra*, at 540-42)).

Complainant contends that he was subject to several adverse actions, beginning in June 1996 and continuing until the instant hearing, that were precipitated by his public allegations that Rule 503 was against the public welfare. These alleged adverse actions include EPA: (1) requiring certain disclaimers or biographical information on journal articles, an abstract, a fact sheet and at oral presentations; (2) requiring coordination with a program office regarding a journal article that was adverse to policies emanating from that program office; (3) undertaking a flawed peer review process; (4) distributing to Complainant's critics a non-EPA paper and an "internal" peer review that were critical of Complainant; (5) failing to respond, or inappropriately responding, to inquiries regarding Complainant and the scope of his employment at EPA and the distribution of a fact sheet; (6) failing to allow Complainant to work on homeland security issues; (7) failing to credit Complainant's Rule 503 research; (8) failing to respond to allegations made in the "White Paper;" (9) collaborating with Complainant's critics to publicly criticize Complainant; (10) failing to provide Complainant further funding for his research in Egypt; and (11) flagging Complainant's work products.[44]

1. Disclaimer and Biographical Information Requirement

The record contains ample evidence that EPA policy requires disclaimers on articles and oral presentations if a scientist states an opinion relating to EPA policy (JX 1, at 64; TR 979, 1013, 1019). Specifically, EPA employees are required to state that they are "speaking as private citizens" and not for EPA when engaged in "outside activities" (JX 1, at 64). The record establishes that Morris has the authority to alter these disclaimers (JX 1, at 47; TR 390, 710-11, 733; *see* TR 724-25, 920). On several occasions EPA questioned Complainant's lack of a disclaimer; specifically, the lack of disclaimer on Complainant's 1996 article in *The Athens Banner Herald* (CX 71; TR 112-15) and the revised *Lancet* article fact sheet (JX 1, at 84-85; RX 90; TR 376-77, 898-99). Additionally, EPA required Complainant to change and/or questioned his existing oral or written disclaimers, specifically the disclaimers accompanying Complainant's *Practical Gastrenterology* article (RX 71; TR 875), *Adverse Interactions* article (CX 78; *see* TR 172-74, 885), *ES & T* article (RX 93; TR 389, 902-02), revised *Lancet* article (RX 103); Arcadia, Florida, presentation (TR 409-10), and the BU abstract (RX 110). Complainant contends that these requirements were discriminatory. Complainant attempted to show that these disclaimer requests were unique to him and argued that no other scientist at EPA was subject to the disclaimer requirements he was subject to (*see, e.g.,* TR 533, 708).

While the record indicates that the requested disclaimers may not have been typical of what EPA requires on similar writings, I do not find that requiring these disclaimers was an

[44] Complainant also contended that EPA's failure to protect his reputation and failure to assign him to sludge-related projects were adverse actions under the environmental whistleblower statutes. I have not specifically addressed these issues in my discussion because these issues are encompassed in my discussion regarding the distribution of non-EPA material and "internal" peer review (*infra* p. 58-60), EPA's lack of response, or inappropriate response, to inquiries regarding Complainant (*infra* p. 60-62), lack of response to homeland security request (*infra* p. 62), failure to credit Complainant's Rule 503 research (*infra* p. 62-63), and failure to respond to allegations in the "White Paper" (*infra* p. 63). Additional discussion on these two contentions would be redundant and unnecessary.

adverse action under the environmental whistleblower statutes because Complainant has failed to show that requiring these disclaimers was in any way adverse or that it resulted in a tangible consequence, either work-related or otherwise. In fact, EPA appears to have tried to mitigate any inconvenience to Complainant in light of its disclaimer requests. For example, the record reflects that Morris specifically requested that ORD keep her abreast of any pending publication deadlines so that her disclaimer requests did not hinder publication of any of Complainant's articles (JX 1, at 120-21; TR 897; *see also* CX 1, at 164). She made it clear that she did not intend to alter any language within the articles aside from the disclaimers (JX 1, at 120-21; TR 897; *see also* CX 1, at 164). When Complainant suggested that the disclaimers were too lengthy and would require subtraction of text from his article (TR 173-74), Morris and Complainant agreed upon a shorter disclaimer (RX 103; TR 401-02, 418, 919). Further, Complainant was still able to submit his articles for publication, despite the pending disclaimer disputes (TR 329; *see* RX 77). Although Complainant may have been annoyed at the requests to change disclaimers, annoyance does not reach the level of a material consequence. Moreover, the changes that Morris proposed were accurate and appropriate.

Additionally, a majority of Complainant's writings and oral presentations were highly critical of EPA's Rule 503 and EPA's policy (CX 82, at 44, 57-59; TR 134-35, 137-42, 397-99, 1248; *see* CX 123, 127; TR 626); and he openly admits, and Russo concurs, that, unlike him, no other scientists stated in their writings that an EPA "regulation is not protective of human health" (TR 573-74; CX 1, at 159). Holm also testified that he is not aware of any other EPA employee questioning an EPA policy "in the manner that [Complainant] has" (TR 629). Clearly, the disclaimers Complainant was told to use were unique because his accusations against EPA were unique. Even if I were to find that the disclaimer requests had a tangible job consequence on Complainant, I would find EPA had a legitimate, non-discriminatory reason for requiring the disclaimers. EPA has every right to explicitly disclaim endorsement of writings and oral presentations by its employees that significantly criticize EPA policy and even accuse EPA of endangering the public. Moreover, EPA permitted Complainant to go forth with publication without altering any of the articles' language.

2. Requirement to Coordinate with OW

The record indicates that it is EPA policy to coordinate with a program office regarding papers that affect that program office (TR 928, 992, 994-95, 1242-43; JX 1, at 29-33). Complainant argues that Morris's June 14, 2001, request for Complainant's coordination with OW regarding *Adverse Interactions* was discriminatory because she was requesting a review from an office that had a conflict of interest and he was worried that OW would inappropriately handle the coordination (TR 174-75, 337-38). However, on May 31, 2001, fourteen days prior to Morris's request, Complainant had already forwarded *Adverse Interactions* to OW for review because Complainant and Holm decided that this review was appropriate (TR 176, 531, 621, 622, 630-31, 1222-23, 1226; CX 84). Since Complainant and Holm agreed, prior to Morris's request, that OW should review the article, I find that Complainant has no basis to argue that Morris's request was inappropriate. Further, even if it were inappropriate, Complainant suffered no tangible job consequences from this coordination with OW. In fact, EPA permitted Complainant to submit *Adverse Interactions* to *Lancet* for publication prior to this coordination. Therefore, the result of the OW review had no effect on Complainant's publication prospects or his employment at EPA. Additionally, Morris's request for coordination was not absolute and it

gave Complainant the option to change *Adverse Interactions'* disclaimer and bypass the coordination process (CX 78; TR 885; *see* TR 172-74, 885). Therefore, I find that this contention is not actionable under the environmental whistleblower statutes.

3. Flawed Peer Review Process

The record contains ample evidence that when EPA conducts an "internal" peer review the peer reviewers should not have any conflicts of interest, should have a relevant technical background, should maintain an accurate peer review journal of all materials used during the peer review, should write the peer review and should not share their peer review comments with third parties (CX 145, at 57, 67-68; TR 325, 361, 528-29, 649-51, 1006-08, 1126-29, 1277, 1282; *see* TR 1275-76, 1291). Walker blatantly violated several aspects of this policy, including sharing the article with third parties for input to write his peer review(TR 229-30, 759-60, 809, 1126; RX 52), submitting another's review as his own (TR 1129, 1139, 1154-55; *compare* CX 55 *with* CX 53) and failing to submit the sources that he used (CX 106-07; TR 771-73, 1158-59, 1168, 1171-73, 1175). It is also apparent that Smith did not use his best judgment when he included Walker in the peer review because of Walker's potential conflict of interest due to his involvement with Rule 503.

Despite evidence of the flawed peer review process, Complainant has presented no evidence of a tangible job consequence that arose from the flawed peer review. He admits that the flawed peer review has nothing to do with *Lancet's* decision not to publish *Adverse Interactions*, which was based on Lancet's own peer review (TR 241-42, 352, 542; *see* RX 190, at 2). However, he contends that the flawed peer review spurred him to seek quick publication in an on-line journal, due to the threat of public dissemination prior to publication (TR 241-42, 363-64). I find the basis for this contention unconvincing, because Complainant's fear of public dissemination developed prior to the flawed peer review. In fact, upon initially submitting the article to EPA for review and prior to the peer review, Complainant requested an expedited review because of a fear of public dissemination (TR 318-21). Also prior to the flawed peer review, Complainant admits that he voluntarily disseminated *Adverse Interactions* without confidentiality warnings to Simms, Harrison and the NAS panel, a CDC scientist and an expert in the field. It also was provided to Synagro due to Complainant's role in the *Marshall* case, albeit under a protective order (RX 196; TR 319, 328, 331-32 348-50; *see* TR 201-02). I do not believe that the flawed peer review culminated in Complainant's fear of public dissemination of *Adverse Interactions*. Further, he testified that he could not get the funding necessary to perform the epidemiological studies that *Lancet* suggested were needed for publication in its journal, and that *Lancet* suggested that he submit the article to a more specialized journal, which he did (RX 56, 84; RX 190, at 2; TR 352, 342, 358, 890). Finally, although the peer review process was flawed, that does not necessarily indicate that the actual peer reviews were flawed. There is no reason to believe that Millner was in any way prejudiced against Complainant; and *Lancet* rejected the article as well. Accordingly, the flawed peer review did not result in a tangible job consequence for the Complainant. In fact, it did not result in any consequence to the Complainant.

4. Distribution of the "White Paper" and "Internal" Peer Review

*The "White Paper"*

The evidence clearly indicates that Walker disseminated Synagro's "White Paper" to several people inside and outside of EPA, including Southern Waste (CX 96, at 3; TR 1184, 1194, 1196-97). The evidence further indicates that Walker was aware of the possibility that Southern Waste would disseminate the "White Paper" at public hearings, including one Complainant spoke at, and represent that EPA had given the "White Paper" to it (*see* CX 82, at 76-77; TR 207-08, 213-15; *see* CX 29, at 12-13).

While both the Complainant and Walker are EPA scientists, they do not work with each other. They are not even in the same program office. In addition, Walker, a GS-14, has no supervisory authority over Complainant, who is a GS-15 (TR 754-56, 758, 1225). Complainant has presented no evidence that relevant people at EPA knew of, or should have known of, Walker's intended dissemination. Walker's supervisors were unaware of his dissemination of the "White Paper" (TR 782, 806); and clearly there has been no evidence presented that Complainant's supervisors had such knowledge. Accordingly, Respondent was not put on notice of this dissemination until Complainant reported Walker's distribution of the "White Paper" to OIG on September 25, 2001 (RX 173; CX 96; *see* TR 218-19, 245-46). OIG promptly investigated the allegation and it reported its findings to Walker's supervisors on October 12, 2001 (RX 173; CX 96; *see* TR 218-19, 430). In response to this investigation, Walker's supervisor found that Walker should not have disseminated the "White Paper," counseled him, required him to have all references to Complainant cleared with management prior to dissemination and required that he clarify EPA's position with regard to the "White Paper" with Southern Waste (RX 174-75; TR 784-86, 1201). Walker complied with these requirements (CX 95; RX 175; TR 252-53, 786, 1202-03). He went even further, requesting Geiger to inform those to whom it distributed the "White Paper" of EPA's position (TR 430-31, 1197-98, 1203; *see* TR 254).

Complainant contends that Walker's supervisor should have consulted him prior to disciplining Walker (TR 430-31). I do not concur with this contention. Complainant has offered no evidence indicating that this type of consultation was, or should have been, EPA's policy; and the law only requires EPA to take "prompt remedial action" upon learning of a co-worker's harassing behavior to escape liability, not to consult a complainant prior to taking this remedial action (*Williams, supra*, at 48 (*Wilson*, *supra*, at 540-42)). Therefore, Complainant's contention that EPA's failure to consult him was a discriminatory action is unfounded.

Complainant further contends that EPA should have required that Walker disseminate a letter, similar to that sent to Southern Waste, to all of the people present at the public hearings where Southern Waste's representative presented the "White Paper" (TR 251-52). Southern Waste, or the other pro-biosolids companies, had every right to distribute the "White Paper." Even if the attendees at this meetings were identifiable, EPA is not responsible for sending these additional letters because there is no evidence that Southern Waste's counsel represented that EPA endorsed the "White Paper." Further, bringing additional attention to the "White Paper" months after the meetings in question might have hurt the Complainant's reputation more that it would have helped it by again bringing attention to the "White Paper."

Complainant also did not believe that OIG or Walker's supervisor's actions regarding dissemination of the "White Paper" were prompt (TR 260). Complainant filed his complaint on

September 25, 2001(*see* CX 96), OIG completed its investigation on October 12, 2001 (RX 172-73) and OWWM disciplined Walker on December 11, 2001 (RX 174). In light of the time it takes to investigate claims and follow internal "EPA" due process procedures, I find that this was a prompt response.

Therefore, I find that EPA acted quickly and appropriately once it was informed of Walker's actions. Accordingly, Walker's actions do not constitute adverse actions by Complainant's employer.

*Internal Peer Review Comments*

Complainant also contends that EPA engaged in an adverse action by providing Synagro and WEF with a copy of Walker's peer review. Complainant believes that because both Synagro and WEF mention, in letters to EPA, a peer review that found Complainant's research "significantly flawed" (CX 102; TR 235-36, 470-71; *see* TR 235-36), that Walker must have provided his peer review to them. The fact that Walker's peer review was the only peer review that labeled Complainant's research "significantly flawed" and that Walker discussed his peer review with the Vice President of Synagro is the evidence presented to support this contention (*see* CX 106-07; TR 235-36, 771-73, 1158-59, 1168, 1171-73, 1175). I find that, at the least, the record indicates that Walker told Synagro about the outcome of his peer review; however, for several reasons, I do not believe that this action was an adverse action under the environmental whistleblower statutes.

First, as was noted in the discussion of the "White Paper," Walker has no supervisory authority over the Complainant. Further, Complainant's supervisors did not know, let alone approve of, Walker's actions regarding the peer review of *Adverse Interactions* (TR 649, 651-52, 758-59, 762, 773, 1144, 1231-32, 1234-35). Complainant presented no evidence that EPA had "constructive" notice of these actions either, especially in light of the few participants involved in the actions. Therefore, upon learning of the adverse actions, EPA needed to issue remedial and preventive discipline to avoid liability (*see Williams, supra,* at 48 (citing *Wilson*, *supra*, at 540-42)). As noted above, it did so. Accordingly, Walker's leaking of the peer reviews is not an adverse action by the Respondent.

Complainant also contends that Walker's supervisor should have consulted Complainant prior to disciplining Walker (TR 430-31). I do not concur with this unsupported contention.

Finally, Complainant has presented no evidence of a tangible job consequence in connection with this dissemination of Walker's peer review comments. Complainant has presented no evidence that anyone outside of EPA has seen Synagro or WEF's letters to EPA referencing the peer review language.[45] Accordingly, although Walker's dissemination of his peer review of Complainant's article to Synagro, whether orally or directly by providing a copy of it to Synagro, demonstrated an extreme lack of judgment by Walker, I find that it was not an adverse action under the environmental statutes.

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[45]The evidence indicates that UGA saw at least one of Synagro's letters to EPA; however, this was because Synagro copied UGA on the letter, not because EPA disseminated it (*see* RX 197, at 5).

5. Lack of Response, or Inappropriate Response, to Inquiries Regarding Complainant

Complainant contends that EPA's lack of response, or inappropriate response, to Synagro, WEF, NAS, UGA and an EPA employee's inquiries regarding him was an adverse action that negatively affected his reputation, harmed his future job prospects at UGA and caused him stress because he believed that he would be subject to criminal prosecution if he was found to have performed research outside the scope of his IPA (*see* TR 220-22, 304). The record indicates that Synagro made four inquiries to EPA requesting clarification of the scope of Complainant's IPA, on July 10, 2001, July 16, 2001, February 6, 2002 and March 27, 2002 (RX 150; RX 197, at 5; TR 193, 195, 434). EPA informed Complainant that it would respond to Synagro's inquiries, but as of the date of the hearing had not (RX 110; TR 277). Interestingly, Complainant objected to UGA's distribution of information to Synagro regarding Complainant's IPA because, while the documents were produced via the Georgia Open Records Act, he did not believe the same documents would have been available though FOIA (TR 315). It seems that Complainant cannot make up his mind about whether the information regarding the scope of his IPA should or should not be released.

The record also indicates that an EPA employee, after receiving the "White Paper," emailed Walker asking if EPA agreed with its contents (CX 119; TR 1198-99) and Walker failed to respond (TR 1198). Complainant contends that EPA did not respond to NAS panel member inquiries regarding EPA's stance on the "White Paper" (TR 304).

Assuming *arguendo* that EPA had an obligation to respond to these inquiries, I nevertheless find that EPA's lack of response was not an adverse action under the environmental statutes at issue because Complainant has shown no tangible job consequence. While Complainant's strongest argument lies in his contention that his job prospects at UGA were diminished because of EPA's lack of response, for several reasons I find this argument speculative at best. First, Complainant never even alleged that he had been offered a professorship at UGA (*see generally* CX 24). The best he could point to was testimony from Hodson that Hollibaugh supported hiring him "100 percent" *if* funds could be raised (CX 24, at 40). That is a far cry from a commitment to hire Complainant. Therefore, there is no evidence in the record to substantiate that there was future employment for EPA to adversely affect.

Second, on November 20, 2000, prior to any inquiries, Complainant sought a letter from Finnis Williams to clarify for UGA Complainant's role in the *Marshall* case (RX 147; TR 311-12). Complainant sought this clarification because Synagro's subpoenas at UGA caused interference with UGA employees' schedules and created controversy at UGA (RX 147; TR 311-12). Further, in 2001, prior to any inquiries into the scope of Complainant's IPA and Complainant's activities or EPA's alleged failure to answer these inquires, Complainant testified during the *Marshall* case that he "no longer plan[ned] to pursue employment at University of Georgia" because of the adverse affect Synagro's litigation tactics have had at UGA (RX 41, at 19-20). Thereafter, on March 14, 2001, Complainant wrote Leed regarding his role as a witness for Synagro in an upcoming disciplinary hearing voicing his disagreement with Leed's representation that Complainant's research was "unrelated to University business" (RX 148; TR 313-14). The record clearly indicates that Complainant's job prospects at UGA were significantly diminished prior to EPA's lack of response or inappropriate response to inquiries

regarding Complainant. Furthermore, Complainant's contention that his job prospects at UGA were eliminated is speculative given the fact that as of the hearing Complainant had not attempted to obtain employment with UGA or any other employer (*see* TR 282-83, 469, 572). In addition, Complainant offered no evidence to show that if EPA responded to Synagro's letter that Synagro would have circulated a response from EPA or that a response would have enhanced his job prospects at UGA. Rather, it must be assumed that if such a response from EPA was favorable to the Complainant, Synagro would not have circulated it. Accordingly, EPA's responses or lack of responses to various inquiries pertaining to Complainant are not adverse actions under the environmental whistleblower statutes.

The record also indicates that Complainant prompted UGA's inquiry to EPA regarding the scope of his IPA when *he*, not UGA, asked Russo to draft a letter discussing the scope of his IPA for UGA (*see* CX 9; TR 243-44; JX 1, at 124). After receiving this letter, UGA made a further inquiry to EPA regarding the scope of his IPA (TR 245). Ultimately, Complainant wrote UGA informing it that EPA will not respond and providing a deposition transcript from an EPA attorney discussing the scope of Complainant's IPA (CX 105; TR 559-60). It is important to note that EPA did provide a written response to UGA's letter to EPA regarding Synagro's inquiry pertaining to Complainant (*see* CX 11). In this response, EPA explains to UGA that EPA has not responded to Synagro's request because of Employment Privacy Laws and outlines EPA's impression of the scope of Complainant's IPA for UGA (*see* CX 11). I find that EPA's response to UGA's inquiry certainly had no tangible job consequence for the Complainant.

Complainant further contends that EPA inappropriately responded to WEF's inquiry regarding him, faulting EPA for not obtaining a waiver from Complainant to appropriately respond to WEF. The record indicates the WEF wrote EPA on February 13, 2002 to inquire about the distribution of Complainant's revised *Lancet* article's fact sheet and mentioned the "significantly flawed" language found in a peer review (CX 102; TR 376; *see* RX 89, at 3). EPA responded to WEF, citing Employment Privacy Laws as a reason for lack of response and indicating that this did not mean that it endorsed what WEF alleged (RX 111; TR 922). Complainant would have liked EPA to inform WEF that the peer review that refers to Complainant's research as "significantly flawed" was an improper review (TR 238, 276). I do not find that EPA's response was inappropriate and do not find that it constituted an adverse action under the environmental whistleblower statutes. Complainant admits that he was aware of the Employment Privacy Laws and that he could have waived his rights under these laws to allow EPA to fully respond to WEF's inquiry (TR 416, 418, 534-35). If Complainant wanted EPA to provide a more detailed response, Complainant should have initiated a waiver. I find that EPA's response to WEF was not an adverse action because Complainant has provided no evidence of a tangible job consequence that arose from it

f. Lack of Response to Homeland Security Request

The record indicates that Complainant's June 4, 2002, letter in which he requested to work on homeland security issues was accompanied by a corollary that EPA alter and extend his agreed-upon retirement date (RX 105, at 5; TR 437-38). He demanded a response from EPA in 10 days (RX 105, at 5; TR 439). At the time of the hearing Complainant did not believe that he had received a response to this request and believed that this was discriminatory (TR 435-36). However, Morris sent an email to Russo on June 24, 2002, stating the EPA will not deviate from

the agreed upon retirement date (RX 109; *see* TR 924-25). I find that this was an adequate response to Complainant's request. In any event, no response from EPA was necessary. Since Complainant had agreed to leave EPA by May 28, 2003 as part of an agreement settling earlier complaints, requiring Complainant to comply with the agreement is not an adverse action.

7. Failure to Credit Complainant's Rule 503 Research

Complainant testified that NAS's conclusions were similar to the conclusions that he made in *Adverse Interactions* and in his expert reports (TR 164-65, 288-92, 295-96, 1306-19; *see* CX 43, at 9; CX 91, at 3, 5-7; CX 140, at 24-27, 34, 38-41). Holm agrees that the conclusions appear similar to Complainant's, but he is not sure if Complainant was the first to express these conclusions (TR 743, 745). Harrison, who testified for the Complainant, stated that NAS did not have a copy of *Adverse Interactions* when it made some of these similar conclusions, that the panel came up with some of these conclusions on their own and that she does not recall Complainant focusing on some of the NAS's specific conclusions in *Adverse Interactions* (CX 140, at 38-40). However, Complainant testified that, during NAS's study of Rule 503, he provided Harrison with a copy of his expert opinion reports and an *Adverse Interactions* manuscript to distribute to the NAS panel (TR 427-29). Because Complainant believes that he brought most of these issues to NAS's attention and EPA agreed to change Rule 503 based on NAS's conclusions, Complainant believes that his Rule 503 research initiated a change at EPA and that EPA has failed to recognize his contribution to this change (RX 189; TR 283-84, 296-97). Upon receipt of NAS's report, EPA requested that its scientists review the results and provide comments; Complainant was not specifically asked to participate despite many EPA scientists' opinions that EPA should have consulted him (CX 140, at 75-76; CX 156; TR 688; *see* TR 694-95, 731, 1305). However, Complainant was permitted to contribute to ORD's response to the NAS results (*see* CX 156; TR 695, 731, 1305). At least one of the EPA scientists reviewing the NAS results noted that EPA should incorporate some of Complainant's research (CX 156, at 8, 16, 29; TR 695-97). The final EPA response makes no mention of Complainant's research (*see* CX 157; TR 743, 1320).

The record clearly indicates that Complainant conducted research relevant to Rule 503; however, I do not believe that EPA has taken an adverse action against Complainant by not mentioning his research in the Federal Register. Even if Complainant's research was instrumental in the revisions to Rule 503, I do not see where EPA had an obligation to single it out in the final rule. Further, the record does not support the contention that Complainant first developed several ideas that NAS and EPA published in the *Federal Register*. Neither Holm nor Harrison's testimony supported this contention; further, Harrison's testimony seemed to indicate that a portion of the information in Complainant's research was common knowledge (*see* CX 140, at 39). Further, the record indicates that ORD always had concerns regarding Rule 503 (*see* JX 1, at 92) and that OWWM requested that OIG investigate EPA's biosolids program as early as 1998 (CX 52, at 110-11). Obviously, this research was not a novel concept. Therefore, despite Complainant's brazen contention that "the failure of EPA to cite to Dr. Lewis' work [is] reminiscent [of] Stalin's airbrushing of history" (*Complainant's Conclusions of Law*, at 92), I do not believe that EPA engaged in an adverse action when it failed to cite Complainant's research in its *Federal Register* publication regarding Rule 503.

Complainant further contends that EPA's failure to include him when it sought input for its response to the NAS study was a discriminatory adverse action. This contention likewise is unfounded. While EPA did not specifically request Complainant's input, he was not forbidden from participating in commenting on EPA's response to the NAS study and did participate through his role in ORD (*see* CX 156; TR 695, 731, 1305). Further, Mintz contacted Complainant to follow up on the comments Complainant had provided in ORD's response (TR 1305). EPA is not obligated to permit Complainant to engage in every activity he wants to work on; it just cannot specifically forbid Complainant from participating because he is a whistleblower. Because Complainant was permitted to participate in EPA's response to the NAS study, I find that EPA did not discriminate against the Complainant in regard to the revisions to Rule 503.

8. Failure to Respond to Allegations in the "White Paper"

Complainant believes that EPA's failure to respond to the allegations in the "White Paper" affected his reputation (TR 304, 421-22). For several reasons, I do not find that EPA engaged in any adverse action under the environmental whistleblower statutes when it failed to respond to Synagro's "White Paper." First, a good portion of the "White Paper" addressed Complainant's expert witness activities in the *Marshall* case (*see generally* RX 68), which were outside the scope of Complainant's EPA employment (TR 133-34, 309); therefore, EPA had no obligation to address it. Second, EPA is not responsible for responding to every regulated industries' commentaries about EPA scientists; placing such an obligation upon EPA would be overly burdensome and impossible to police. The "White Paper" clearly was a commentary about Complainant engendered by a business enterprise in response to Complainant's voluntary, private activities (*see* RX 68). Finally, Complainant has presented no evidence of a tangible job consequence linked to EPA's failure to respond to Synagro's "White Paper." Accordingly, I find that this contention is not actionable under the environmental whistleblower statutes.

9. Collaboration with Biosolid Proponents

Complainant also contends that EPA worked in concert with companies and organizations who were proponents of the land use of biosolids -- including Synagro, NEBRA and WEF -- to harm Complainant's reputation. First, Complainant alleges that Morris's suggested disclaimer language reflected the language from Synagro's "White Paper" (TR 173, 341). The record indicates that the same language that Morris suggested is, in fact, found in the NERL Policy and Procedures Manual for disclaimers regarding project reports and proceedings of technical conference and symposia, not the "White Paper" (RX 132, at 12-13; TR 640-41; *see* TR 341-46). Further, Morris first proposed this disclaimer language on June 14, 2001 and the record indicates that the "White Paper" was not publicly released until September 21, 2001, clearly indicating that EPA did not take this disclaimer language from Synagro's "White Paper" (*see* RX 67, 68, 78). Accordingly, I find that this contention is unfounded.

Second, Complainant believes that Walker discussed the peer review of *Adverse Interactions* with Synagro to aid Synagro's attempt to overturn the protective order in the *Marshall* case (TR 185, 187-89). Specifically, Complainant believes that Walker's discussion of *Adverse Interactions* equipped Synagro with an argument that the *Marshall* court should modify the protective order to allow Synagro to provide information to Walker for his peer review or

vacate the protective order altogether (TR 185-90). I must admit I do not understand Complainant's argument in regard to the protective order. Further, even if I found that Synagro and EPA collaborated to try to overturn the protective order, there is no evidence on the record that Synagro succeeded in doing so. Therefore there is no evidence of a tangible consequence, job-related or otherwise.

Third, Complainant alleged that the July 10, 2001 meeting between Walker, O'Dette and Cook, Walker's supervisor, was evidence that Synagro and EPA were working together (TR 571; *see C*X 109, at 9; TR 769-70, 810-11, 1162-63, 1165-66). However, the only evidence of the substance of this meeting, directly or indirectly, is from Walker, and he states that the purpose of this meeting was to discuss EPA's refusal to provide an expert witness for Synagro in the *Marshall* case while allowing Complainant to be an expert witness for the Plaintiff in the case (*see, e.g.,* TR 1164; CX 109, at 9-10). Regardless of whether Walker's version of events regarding Synagro can be relied upon, it is uncontradicted in the record. Accordingly, I do not find that this meeting supports Complainant's contention that EPA and Synagro acted in concert against Complainant.

Fourth, Complainant alleges that EPA shared Walker's peer review with WEF in an effort to collaborate with WEF against Complainant (TR 472-72). After investigation, OIG found no evidence of such collaboration and Complainant approved of the quality of OIG's findings (CX 89, at 5; TR 485-86). I have already discussed my findings regarding this issue and do not find it necessary to duplicate that discussion.

Fifth, Complainant further alleges that EPA is collaborating with NEBRA against him, pointing to NEBRA's website as evidence (*see* TR 604-05). Bu NEBRA's website contains a link to Complainant's website, which is not what one would expect if NEBRA was collaborating against him. Moreover, upon learning of the lack of disclaimer on NEBRA's website, EPA immediately required NEBRA to comply with EPA policy regarding disclaimers (TR 788-90; CX 97; RX 186-87; *see* CX 137). Although EPA and NEBRA may both support land application of biosolids, it does not mean they are collaborating against the Complainant.

Therefore, I find that there is no reliable evidence that EPA collaborated with any person or organization against the Complainant.

10. Failure to Provide Extra Funding for Egypt Research

After his IPA had ceased, Complainant requested additional funding for his research in Egypt (CX 155; *see* JX 1, at 133-35). While he obtained ORD approval, he did not receive the funding from upper management and believes that this is an adverse action based upon his protected activities (CX 155; JX 1, at 134-35; TR 692-93, 728). However, the record indicates that at the time of Complainant's request ORD suffered major funding cuts (TR 729). Further, since the Complainant would be retiring soon after the IPA ceased, it was reasonable for EPA not to fund his additional research requests. While Complainant did suffer a tangible job consequence (*i.e.*, lack of funding for research), Complainant has presented no evidence linking this lack of funding to his Rule 503 research. Therefore, I find that EPA's failure to fund his research in Egypt was not discriminatory.

11. Flagging Complainant's Work Product

Russo and Foley both testified that they were required to forward *all* of Complainant's scientific and technical writings to NERL (CX 45, at 12-13; JX 1, at 10; *see* RX 70). Foley stated that this was the policy because Complainant's writings involved policy and NERL wanted a "heads up" (CX 45, at 12-13). He further stated that EPA policy requires employees to forward writings containing sensitive subjects to OGC (CX 45, at 12, 20-21, 99). However, the record clearly indicates that Morris told Russo that she should not

> forward articles for NERL or ORD HQ review or information solely because they are authored by David Lewis or any other employee. . . . [P]lease forward copies of . . . products . . . following the guidance contained in the *National Exposure Research Laboratory Policy and Procedures for Clearance of Scientific and Technical Products (STP)*, dated March 1999, the "Heads Up" memorandum from Henry Longest dated July 15, 1998, the memorandum from Gary J. Foley dated April 4, 2000 on the subject of procedures for processing scientific and technical products with policy implications, and any other applicable NERL/ORD policy or guidance

(RX 71; *see also* TR 1011). Upon reading this statement, Russo still believed that she should forward all of Complainant's papers to Morris (JX 1, at 15; *see* CX 1, at 93). It is obvious that Russo misinterpreted Morris's request. It is also clear that EPA upper management only wanted Complainant's writings sent to it if the writing had policy implications (*see* RX 71; TR 1011). EPA policy required *all* EPA employees to forward writings with policy implications, along with an accompanying fact sheet and memorandum, to NERL for review (RX 131, 133; TR 873-74, 949, 952). Therefore, I do not find that Complainant was subject to an adverse action when EPA upper management required review of his writings with policy implications because every EPA scientist was subject to this review.

Throughout the events that comprise the substance of the instant case, Morris consulted OGC whenever she received information regarding Complainant because of his numerous whistleblower allegations (TR 930-31, 956, 959). Smith also sent correspondence from Complainant to OGC for similar reasons (RX 226-27; TR 1259-60). Russo testified that these types of consultations were unique to Complainant (CX 1, at 93). Despite this uniqueness, I do not find that these consultations with OGC were adverse actions to Complainant. The consultations did not produce a tangible job consequence to Complainant. Further, EPA is entitled to consult OGC to ensure that it is not making discriminatory decisions regarding one of its employees. Accordingly, I do not find that EPA's consultation with OGC regarding Complainant is an actionable adverse action under the environmental whistleblower statutes.

## CONCLUSION

The record is replete with evidence that EPA allowed Complainant to participate in cases to which EPA was not a party as an expert witness, to make oral presentations and to publish scientific and technical papers, all without censorship despite his blatant disagreement with EPA policy. All that was asked in return was that he provide his supervisors with timely notice of such activities and state that EPA does not necessarily endorse his views.

The Complainant truly believes that Class B sludge poses a significant danger to people who are living in the vicinity of sites where sludge is applied to the land. What is more, it is possible that he is right. But, as the peer reviews indicate, he has not provided credible scientific evidence to back up his belief, and he seems surprised to have discovered that those who believe just as strongly that the land application of biosolids is safe and beneficial, and may have a financial stake in the continued land application of biosolid as well, have not stood idly by while he questions the validity of their work and the safety of their product. Moreover, he expects EPA to jump to his defense, despite his repeated criticism of the Agency, when his opinion – and ultimately his reputation – is challenged because of his activities outside of his work for EPA. Furthermore, he is unhappy over the agreement he made with EPA in settlement of a previous whistleblower complaint which required him to retire from EPA in May 2003, and wants to get out from under that agreement.

One individual at EPA clearly overstepped his bounds in matters affecting the Complainant. But that individual was a scientist at a grade lower than the Complainant and had no authority over the Complainant, and his activities cannot be imputed to the Agency. Moreover, he was quickly disciplined when EPA became aware of what he had done. That Complainant's job prospects at the University of Georgia may have dimmed, or his reputation in the scientific community may have suffered, because of criticism of the Complainant from outside of EPA cannot be found to be an adverse action by EPA.

In sum, any actions EPA took in regard to the Complainant either were not adverse actions or were taken for legitimate reasons and not for retaliation. Complainant has failed to prove that the Respondent discriminated against him due to activity protected under any of the environmental whistleblower statutes under which this case was brought. Therefore, it is recommended that this case be dismissed in its entirety.

**RECOMMENDED ORDER**

It is recommended that this case be dismissed.

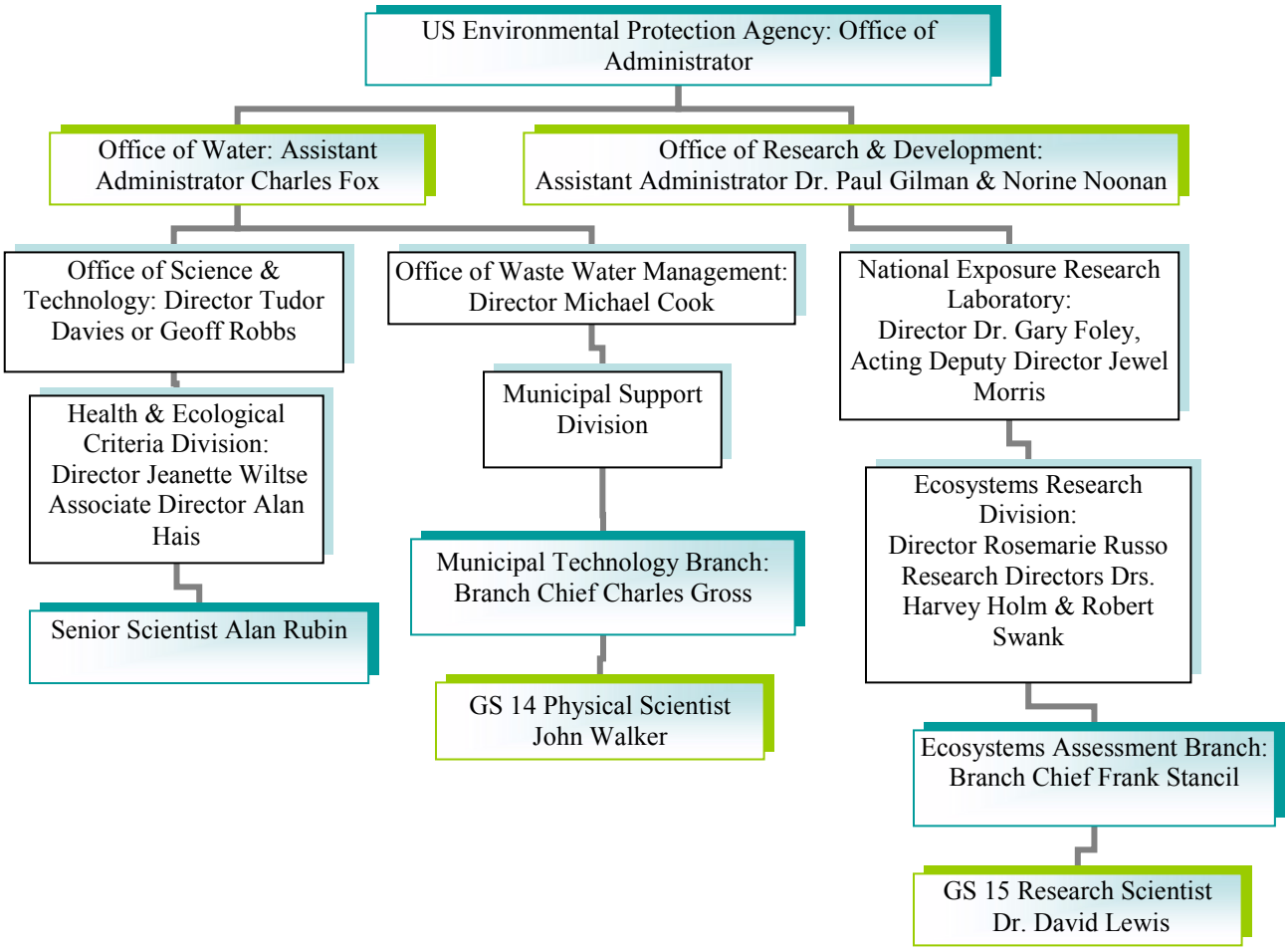
A

JEFFREY TURECK
Administrative Law Judge

**Appendix A**

| | |
|---|---|
| Assistant Administrator | "AA" |
| American Academy for the Advancement of Science: | "AAAS" |
| American Dental Association: | "ADA" |
| *Adverse Interactions of Irritant Chemicals and Pathogens with Land Applied Sewage Sludge:* | *"Adverse Interactions"* |
| Assistant Lab Director: | "ALD" |
| Administrative Law Judge: | "ALJ" |
| Board of Commissioners for Dawson County, Georgia: | "Board of Commissioners" |
| Biosolids Program Implementation Team: | "BPIT" |
| Boston University: | "BU" |
| Center for Disease Control: | "CDC" |
| David L. Lewis: | "Complainant" |
| Ecosystems Assessment Branch: | "EAB" |
| Ecosystems Research Division: | "ERD" |
| *Environmental, Science & Technology Journal*: | *"ES & T"* |
| *Risk from Pathogens in Land Applied Sewage Sludge*: | "*ES & T* article" |
| Annual Meeting and Science Innovation Exposition: | "Exposition" |
| Freedom of Information Act: | "FOIA" |
| Health and Ecological Criteria Division: | "HECD" |
| House Science Committee: | "HSC" |
| Intergovernmental Personnel Act assignment: | "IPA" |
| Municipal Support Division: | "MSD" |
| Municipal Technology Branch: | "MTB" |
| National Academy of Science: | "NAS" |
| National Biosolids Partnership: | "NBP" |
| New England Biosolids and Residuals Association: | "NEBRA" |
| National Exposure Research Laboratory Division: | "NERL" |
| National Research Council: | "NRC" |
| National Whistleblower Center: | "NWC" |
| Office of General Counsel: | "OGC" |
| Office of Inspector General: | "OIG" |
| Office of Research and Development: | "ORD" |
| Occupational Safety and Health Administration: | "OSHA" |
| Office of Science and Technology: | "OST" |
| Office of Water: | "OW" |
| Office of Waste Water Management: | "OWWM" |
| Environmental Protection Agency: | "Respondent" or "EPA" |
| revised version of *Adverse Interactions*: | "revised *Lancet* article" |
| Research Triangle Park, North Carolina: | "RTP" |
| 40 C.F.R. 503: | "Rule 503" or "Sludge Rule" |
| Steris Corporation: | "Steris" |
| Synagro Technologies, Inc.: | "Synagro" |
| University of Georgia: | "UGA" |
| United States Department of Agriculture: | "USDA" |
| Water Environmental Federation: | "WEF" |

## Appendix B


US Environmental Protection Agency: Office of Administrator
Office of Water: Assistant Administrator Charles Fox
Office of Research & Development: Assistant Administrator Dr. Paul Gilman & Norine Noonan
Office of Science & Technology: Director Tudor Davies or Geoff Robbs
Office of Waste Water Management: Director Michael Cook
National Exposure Research Laboratory: Director Dr. Gary Foley, Acting Deputy Director Jewel Morris
Health & Ecological Criteria Division: Director Jeanette Wiltse Associate Director Alan Hais
Municipal Support Division
Ecosystems Research Division: Director Rosemarie Russo Research Directors Drs. Harvey Holm & Robert Swank
Senior Scientist Alan Rubin
Municipal Technology Branch: Branch Chief Charles Gross
GS 14 Physical Scientist John Walker
Ecosystems Assessment Branch: Branch Chief Frank Stancil
GS 15 Research Scientist Dr. David Lewis